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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1150~~. ~~792~~ 36643

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO OCEGUERA, ET AL., APPELLANTS.

vs.

THE SANTA RITA LAND & MINING COMPANY AND THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MAY 31, 1889.

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OCTOBER TERM, 1889.

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vs.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francico Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Plaintiffs and Appellants,

vs.

THE SANTA RITA LAND AND MINING COMPANY (a Corporation) and The New Mexico and Arizona Railroad Company (a Corporation), Defendants and Appellees.

1 *Complaint.*

Plaintiffs complain of defendants and for cause of action allege—

I.

That the defendant, The Santa Rita Land and Mining Company, is and for over four years last past has been a corporation organized and existing under and by virtue of the laws of the State of Colorado and doing business in the county of Pima, Territory of Arizona.

II.

That the defendant, The New Mexico and Arizona Railroad Company, is and for more that [than] four years last past has been a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and doing business in the said county of Pima.

III.

That the plaintiffs are the owners in fee of all that certain piece or parcel of land situate in the county of Pima, Territory of Arizona, commonly known and called the "Ranchos" Tumacacori," "Calabasas," and "Huevavi," being the same lands and premises sold and granted by the Mexican Government to Francisco Alexandro Aguilar on the nineteenth day of April, 1844, containing about fifty-two thousand acres.

2 IV.

That the above-named defendants and each of them claim an estate or interest in and to said above-described lands and premises adverse to these complainants and to each of them.

That the said claim of the said defendants and each of them is without any right whatsoever, and the said defendants have not, nor have any or either of them, any estate, right, title, or interest whatever in said lands or premises or any part thereof. Wherefore complainants pray—

1st. That the defendants and each of them be required to set forth the nature of their said claims, and that all adverse claims of the defendants and each of them may be determined by a decree of this court.

2nd. That by said decree it may be declared and adjudged that the defendants have no estate or interest whatever in or to said lands and premises or in or to any part thereof, and that the title of complainants is good and valid.

3rd. That the defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said lands or premises or to any part thereof adverse to said plaintiffs or to any of them, and for such other and further relief as shall be meet and agreeable to equity, and for costs of suit.

JEFFORDS & FRANKLIN,
Attorneys for Plaintiffs.

Indorsed: Filed June 25th, 1887. J. H. Martin, clerk.

3 *Answer.*

Title of court and cause.

The New Mexico and Arizona Railroad Company answer the complaint and allege—

Demurrers.

First. That the complaint is not sufficient in law.

Second. That the complaint is not sufficient in form, in this, that the plaintiffs' title is not exhibited, and the complaint is otherwise uncertain, informal, and insufficient.

Pleas.

First. The defendant denies that the plaintiffs or any of them are the owners in fee or otherwise of the premises described in the complaint or any part thereof.

Second. The defendant alleges that it is the owner in fee, in possession, and entitled to the possession of that portion of the premises described in the complaint which constitutes its railroad, road-bed, right of way, stations, station-houses, and land appurtenant thereto on and across the same, and that it claims no other interest or estate therein.

Third. That neither the plaintiffs, their ancestors, predecessors, or grantors or any of them were seized or possessed of the premises described in the complaint or any part thereof within five years before the commencement of this action.

Fourth. That the defendant, its grantors, predecessors in interest, have held and been in possession of that part of the
4 premises described in the complaint which constitutes its railroad, — bed, right of way, stations, station-houses, and

land appurtenant thereto on and across the same adverse to the plaintiff and all the world for more than five years next prior to the commencement of this action.

HAYNES & MITCHELL,
Att'ys for said Def't.

Indorsed: Filed Oct. 22nd, 1887. J. H. Martin, clerk.

Amended Answer.

Title of court and cause.

Now come the defendants, The Santa — Land and Mining Company, by Haynes & Mitchell, their attorneys, and, by leave of court first had and obtained, &c., file the following amendment to their answer herein—that is to say:

Plea 5th.—The defendants allege that heretofore, to wit, on April 19th, 1844, the lands in controversy in this action were duly granted by the State of Sonora to Francisco Aguilar in fee, and the title papers or expediente were duly delivered to him; that afterwards, on the 31st day of March, 1856, the said Francisco Aguilar granted and conveyed the said premises to Manuel Maria Gandara in fee, and at or before said date delivered to him the said expediente.

That afterwards, on the 2nd day of March, 1869, said Francisco A. Aguilar granted and conveyed all his interest in the
5 said premises to Miguel Gandara.

That afterwards, on or about January 27th, 1879, by good and sufficient mesne conveyances in the law, all the title of the said Manuel Maria and Miguel Gandara became duly vested in C. P. Sykes and John Curry, and thereupon, afterwards, on or about December 22nd, 1879, the said Sykes and Curry presented their petition to the surveyor general of the Territory of Arizona and filed with him their title papers, including the original expediente, and prayed a confirmation by the proper tribunals of the Government of the United States of their title to all the lands described in said original title papers, being the premises described in the complaint.

That afterwards, on or about January 7th, 1880, John Wasson, the surveyor general of the Territory of Arizona, reported upon the said petition and claim and recommended a confirmation to the claimants, C. P. Sykes and John Curry, of the said lands.

That defendants claim the said lands under and by virtue of sundry good and sufficient mesne conveyances from the said Sykes and Curry and others to them, and that they entered into possession of the said premises under a deed describing the same, dated September 21st, 1881, and have ever since that day been in open and notorious possession thereof, claiming title thereto.

Wherefore defendants pray that they be hence dismissed
6 with their costs in this cause by them most unjustly sustained.

HAYNES & MITCHELL.
Att'ys for Defendants.

Indorsed: Filed Feb. 6th, 1888. J. H. Martin, clerk.

Amended Answer.

Title of court and cause.

Now come the defendants, The New Mexico & Arizona R'y Co., by Haynes & Mitchell, their attorneys, and, by leave of court first had and obtained, &c., file the following amendment to their answer herein—that is to say:

Plea 5th.—The defendants allege that heretofore, to wit, on April 19th, 1844, the lands in controversy in this action were duly granted by the State of Sonora to Francisco Aguilar in fee, and the title papers or expediente were duly delivered to him.

That afterwards, on the 31st day of March, 1856, the said Francisco Aguilar granted and conveyed the said premises to Manuel Maria Gandara in fee, and at or before said date delivered to him the said expediente.

That afterwards, on the 2nd day of March, 1869, said Francisco A. Aguilar granted and conveyed all his interest in the said premises to Miguel Gandara.

That afterwards, on or about January 27th, 1879, by good and sufficient mesne conveyances in the law, all the title of the
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That afterwards, on or about January 7th, 1880, John Wasson, the surveyor general of the Territory of Arizona, reported upon the said petition and claim and recommended a confirmation to the claimants, C. P. Sykes and John Curry, of the said lands.

That afterwards, on or about September 21st, 1881, all the title of the said Sykes and Curry in and to the said premises became duly vested in fee in The Santa Rita Land and Mining Company, defendants herein.

That the New Mexico and Arizona Railroad Company are in possession and claim that portion of the premises in controversy which constitutes its railroad, road-bed, right of way, stations, station-houses, and the land appurtenant thereto on and across the same by virtue of certain proceedings begun by them October 3rd, 1882, against the Santa Rita Land and Mining Company to condemn the same, in which said proceedings the lands claimed by
8 the said railroad company were condemned on the — day of ——, 188–, and the railroad company afterwards, on March 5th, 1884, paid to the said Santa Rita Land and Mining Company the amount at which in said proceedings the lands condemned were appraised.

Wherefore the defendants pray that they may be hence dismissed with their costs in this cause by them most unjustly sustained.

HAYNES & MITCHELL,
Att'ys for said Def'ts.

Indorsed: Filed Feb. 6th, 1888. J. H. Martin, clerk.

Answer.

Title of court and cause.

The Santa Rita Land and Mining Company answer the complaint as follows:

Demurrers.

First. That the said complaint is not sufficient in law, in this, that the plaintiffs' title is not exhibited, and that the complaint is otherwise uncertain, informal, and insufficient.

Pleas.

First. The defendants deny that the plaintiffs or any of them are the owners in fee or otherwise of the premises described in the complaint or any part thereof.

Second. The defendant alleges that it is the owner, in possession, and entitled to the possession of the premises described in the complaint and every part thereof in fee.

9 Third. That neither the plaintiffs, their ancestors, predecessors, or grantors or any of them were seized or possessed of the premises described in the complaint or any part thereof within five years before the commencement of this action.

Fourth. That this defendant has held and been in possession of the premises described in the complaint and of every part thereof adversely to the plaintiffs and all the world for more than five years next prior to the commencement of this action.

HAYNES & MITCHELL,
Att'ys for said Def't.

Indorsed: Filed Oct. 22nd, 1887. J. H. Martin, clerk.

Minute Entry, February 2nd, 1888.

Title of court and cause.

This cause came on regularly for trial on this day before the court, Messrs. Jeffords & Franklin appearing as counsel for plaintiffs and Judge Mitchell appearing for defendants.

Certain documentary evidence was introduced by both parties, and Mr. Ainsa was called, sworn, and examined on the part of defendants, and the cause was continued until to-morrow for argument.

Minute Entry, February 6th, 1888.

Title of court and cause.

This cause came on this day to be tried before the court sitting without a jury, and thereupon came all the parties, by their attorneys, and the court, having heard the evidence and arguments of counsel, finds for the defendants.

It is therefore ordered that the plaintiffs' complaint in this case be dismissed and that judgment be entered in favor of the defendants, and that the defendants recover their costs.

And this day came on to be heard the plaintiff's motion for a new trial in the above-entitled action, and thereupon came all of the parties, by their attorneys, and the court, having heard the arguments of counsel and being fully advised in the premises, does overrule and deny said motion; to which order of the court the plaintiffs excepted, and gave notice of appeal.

Motion for New Trial.

Title of court and cause.

Now come the plaintiffs in the above-entitled action and move the court to vacate the judgment and grant a new trial of this action for the following reasons:

1st. Because the judgment and decision are contrary to the evidence.

2nd. Because the judgment and decision are contrary to the law.

3rd. Because the court erred in admitting improper evidence at the trial against plaintiffs' objection.

4th. Because the court erred in dismissing plaintiffs' complaint in this action.

JEFFORDS & FRANKLIN,
Att'ys for Pl'ff's.

Indorsed: Filed Feb. 6th, '88. J. H. Martin, clerk.

11 *Judgment.*

Title of court and cause.

This cause having been heard by the court upon the pleadings and evidence, and the court having considered the same and having heard Messrs. Jeffords & Franklin for the plaintiffs and Messrs. Haynes & Mitchell for the defendants, and being now fully advised in the premises, finds the facts to be as set forth in the written statement of facts heretofore filed in this cause.

It is therefore considered and adjudged by the court that the plaintiffs' complaint in this case be dismissed, and that the defendants do

have and recover from the plaintiffs the sum of $6.25, as and for their costs of suit, to be taxed.

WM. H. BARNES, *Judge.*

Tucson, A. T., Feb. 6th, 1888.

Indorsed: Filed Feb. 6th, 1888. J. H. Martin, clerk.

12 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs,
vs.
THE SANTA RITA LAND AND MINING COMPANY *et al.*, Defendants.
} Action to Quiet Title.

Statement of Facts.

On this second day of February, A. D. 1888, the same being one of the regular days of the September (1887) term of said court, this cause came on for trial before the court, the Honorable William H. Branes, judge of said court, presiding.

Messrs. Jeffords & Franklin appearing for the plaintiffs and Messrs. Haynes & Mitchell for the defendants, and a trial by jury having been expressly waived by both parties, the cause was tried by the court without a jury; and the facts are as follows:

I.

The Mexican Government, in April, 1844, granted and sold all the lands described in the complaint in this action to Francisco Alejandro Aguilar in fee by certain original title papers which the defendants admit vested a good and legal title in fee in said Fran-
13 cisco Alejandro Aguilar; of which original title papers, for convenience hereinafter called the "expediente," the following is a true and correct translation, to wit:

ARIZPE, 1807.

Title of adjudication, duly confirmed, of the lands belonging to the natives of Tumacacori, in consideration of the fundo legal of the pueblo, issued in favor of the Indians, their community and republic, by the juzgado privativo de tierras de la intendencia of governo of the Provinces of Sonora and Sinaloa.

Charles 4th, whom God preserve, King of Spain, twenty-four reals, first seal, twenty-four reals, years 1796 and 1797; six dollars, Charles 4th, whom God preserve, 1806 and 1807.

Don Alexo Garcia Conde, brigadier of the royal armies, intendente of province, of the royal treasury, political and military governor and judge privativo de medidas ventas composiciones y repartamientos of the Provinces of Sonora and Sinaloa, by his majesty, whom God preserve, etc.

Whereas the king, our lord, by article 81 of the royal ordinanza

and instruction of intendentes issued in Madrid on the 4th day of December, 1786, has been pleased to order to be annexed to the jurisdiction of those magistrates the authority of the juzgado privativo de medida venta and of lands in their respective provinces, as required by the article, which is of the following tenor:

14 Article 81. The intendentes shall also be judges "privativos" in matters occurring in the districts of their provinces in relation to sales "composiciones" and distribution of vacant lands (tierras realengas), the possessors of the same and those who petition for new concessions being required to set forth their rights and to make their petitions before the said intendentes, so that, they being duly informed in the relation to the matter of proper officers or authorities appointed, the same may be determined in accordance with justice, taking the opinion of the proper attorney, and allowing an appeal to the "superior junta haciendo" or submitting to the same the original proceedings when they are in a condition for title to be issued, to the end that in view of the same, that if there is no doubt in relation to the matter, the titles may be issued or that such proceedings may be taken as the junta may require; in the meantime the corresponding confirmation may be made without further difficulty, which will be issued in due time by the said superior junta; proceeding in this matter, as also the intendentes, their sub-delegates, and others, in accordance with the requirements of the royal instructions of the 15th of October, 1754, so far as the same is not in opposition to this, without losing sight of the provisions of the laws referred to therein and of title 9–12, Book 4.

In consequence thereof, and a petition having been made to this "intendencia" and juzgado privativo of lands by the com-
15 munity of the natives of the pueblo "Tumacacori," situated in the district of Pimeria Alta, for the making out and the adjudication of the lands corresponding to them, as well for the "fundo legal" of their pueblo as for the "estancia" or rancho of the same, in accordance with the superior royal orders in relation to the matter, the corresponding proceedings have been instituted, which is as follows:

To the señor, governor intendente, judge privativo of lands, Juan Legarro, governor of the Indians of the pueblo Tumacacori, situated in the district of La Pimaria Alta; Filipe Mendoza, Jose Ignacio Arriola, Ramon Panplona Jabier, Ignacio Medina, the principal natives of the said pueblo, and being at present in the capital, for themselves and in the name of and in representation of all the natives of the community of that republic, before your honor in due form of law appear and say—

That our pueblo needing the lands necessary for and corresponding to the same as a fundo legal, as also for "estancia" or rancho, since inasmuch as the ancient title under which the same was acquired has been lost, we are entirely ignorant of the terms in which the same was made and, as a matter of course, of the true and legitimate boundaries of the same, and are therefore under the urgent necessity of asking that the same be marked out in accordance with the orders of his majesty and other superior orders in the matter.

Wherefore we apply to your honor, earnestly praying you to
16 be pleased to direct such proceedings to be taken as may be necessary, so that, at once and in accordance with the general orders of those sovereign authorities, the said distribution of the lands for both purposes may be made, which should be conceded to us with the understanding that the four leagues (one toward each wind) that, on account of the "fundo" of the pueblo, are to be marked out to us are to be measured in a proportional and equitable extent in the direction that we may desire, at our discretion, for the just and prudent end, including within the said four leagues such lands as are suitable for sowing purposes, and with the understanding also that, in relation to the lands that are to be given as an "estancia" (rancho), they are to include the post of Guebabi and its appurtenances, as well because this land is the most suitable for the stock of our mission of Tumacacori and offers the best advantages for the increase of the same, as the Guebabi has been considered as the property of the said mission, as the pueblo cavesa (chief pueblo) of the same; and I, the present governor, being one of the natives of the ancient pueblo of Guebabi, we also ask that there be included in the said sitios the post or place named "La Vaca del Ponaro," this being useful to us from the fact that it is situated near our mission; wherefore, in the terms set forth in this our earnest and formal petition, we rely on the beneficence of your honor to cede to us what we ask as a matter of justice to the community of natives of
17 our republic, all in accordance with the sovereign intentions of the king, our lord, which are always directed towards the benefit of his faithful vassals, the poor Indians, especially those who, like us, are surrounded by hostile and barbarous enemies.

Wherefore we pray your honor to be pleased to grant what we ask, since the same is just, swearing that we do not proceed in malice, and whatever is necessary. At the request of the parties present.

IGNACIO DIAZ DEL CARFIO.

ARIZPE, *December 17th*, 1807.

The foregoing having been duly presented according to law for the purpose of making the measurements of the "fundo" of the pueblo and the "estancia," corresponding to the natives of Tumacacori, let a commission be given in due form to the veteran ensign, actual commandant, and accidental political judge of the military, post of Tubac, Don Manuel de Leon, who is required, in consideration of the facts that said lands are situated in his jurisdiction, to proceed to the measurement of the same, selecting for the purpose such a time as he may be least occupied with the duties of the service, and when by an absence of three or four days, which this matter may require, the military matters which require his principal attention will not suffer by his absence, and the said commissioner shall measure to said natives one league toward each wind or the
18 four leagues, where it may best suit them, of the best lands adjoining their pueblo, without prejudice to third parties, ceding for this purpose the colindantes, if there should be any; and, besides the said four leagues, there shall be adjudicated to them an

'estancia" for stock of the larger kind, which shall include, at the most, two sitios in the place most convenient to those natives.

The señor intendente thus decreed, ordered, and signed with the assistant witnesses, with whom he acted for want of a notary public.

ALEJO GARCIA CONDE.

Assistant: CITIZEN RAMON MENDOZO.
Assistant: JUAN ALEJO CARRILLO.

Don Manuel de Leon, veteran ensign and actual commandant of the presidio of Tubac, Juan Legarro, governor of the mission of Tumacacori, for himself and in the name of all of the Indians in said mission, having presented the present superior decree issued by Senor Brigadier Don Alejo Garcia Conde, political and military governor, intendente of the royal treasury, and judge privativo of the lands of the Province of Sonora, &c., said that, obeying as he at once obeys commissions issued by virtue of the said superior decree, he ordered that, the party interested being previously summoned, in company with two individuals to my satisfaction who serve as assisting witnesses in these proceedings, I shall proceed immediately to make said measurements, proceeding for the purpose to said mission
19 of Tumacacori, and for this act thus I ordered and signed with the assisting witnesses, acting with the same for want of a notary public, on this 13th day of January, 1807.

Wherefore I, the commissioner, Don Manuel de Leon, Juan Legarro, governor of the mission of Tumacacori, and the other Indians being present, I made known to them the foregoing act, whereupon, understanding the same, they said that they acknowledged and signed with me and the assisting witnesses.

MANUEL DE LEON.

Assistant: YOREBIO ALEXO.
Assistant: JUAN NEPONUSENO GONZALES.

At the mission of San Joseph Tumacacori, on the 13th day of the month and year aforesaid, I, said commandant and surveyor commissioner, inquired what individuals were owners of land adjoining the lands of the pueblo of Tumacacori, as that by the citation of the same and by their appearance the measurements might be proceeded with, and being informed by various ancient residents of the presidio of Tubac and of the said mission that there was no colindante in any direction save at the presidio of Tubac, distant one league from said mission, I ordered the same to be included in the proceedings, signing the same with the assisting witnesses.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

20 At the said mission Tumacacori, on the said day, month, and year, I, the said judge, commissioner, Don Manuel de Leon, veteran ensign and present commandant of Tubac, for the purpose of making the measurements of said mission of Tumacacori, as well of the agricultural lands as of pasture lands, I proceeded to the appoint-

ment of persons of sufficient intelligence for this purpose, appointing as a counter Leorenzo Berdiego; as measurers, Jose Miguel Soto Mayor, Juan Estavani Romero, and as tally-keepers, Leon Osorio and Ramon Rios, residents of the presidio of Tubac, excepting the last-mentioned one, who is a resident of Tumacacori, who, being present before me they, the said counter, measurers, and tally-keepers, were notified respectively of their appointments, whereupon they said they accepted the same and promised to perform their duties as such officers well, faithfully, and legally, without deceit, fraud, or malice, and to the best of their knowledge and ability under the sanctity of an oath, which they received in due form of law, which all and each one made by God our Lord and the sign of the holy cross, the solemnity of which they understood as well as the obligations of their respective offices.

In witness whereof I made this entry in the proceedings, which is signed Jose Miguel Soto Mayor, for himself, and in the name of the said officers appointed, who cannot write, I signed the same in the ordinary form with the assisting witnesses.

MANUEL DE LEON.
JOSE MIGUEL SOTO MAYOR.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

21 At the mission of San Jose of Tumacacori, on the 14th day of the month of January, 1807, I, the said judge, commissioner, surveyor, Don Manuel de Leon, veteran ensign and actual commandant of Tubac, having proceeded to said mission in company with the officers appointed, the counter, measurers, and markers, and by the said assisting witnesses and five other residents, who, being armed, accompanied us as an escort, for the purpose of commencing the measurement of the lands pertaining to said mission, as well for a "fundo legal" belonging to it as a mission, as also for an "estancia" (stock rancho) for the raising of large and small stock, I ordered said governor, Juan Legarro, and the other Indians of the mission to proceed to point out the centre, who, giving me to understand that during the time Senor Pineda was governor of these provinces it was agreed that the lands should be divided, leaving to the natives of this mission the lower part of the valley towards the north, his honor giving them power to take what might be lacking on this account, in whatever direction might be most desirable, wherefore the cross in the burying ground in said mission was fixed upon as the centre, the measurements of the lands as asked for to commence at said cross.

In witness whereof I sign with the assisting witnesses.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: NEPOMUSENO GONZALES.

22 At the said mission of San Jose de Tumacacori, on the 14th day of January, 1807, I, Don Manuel de Leon, veteran ensign

and actual commandant of the presidio of Tubac, judge surveyor, commissioned for the measurement of these lands by the senor brigadier, Don Alejo Garcia Conde, governor intendente, political and military judge, and judge privativo of the lands of these Provinces of Sonora, *and* &c., Juan Legarro and the other Indians composing the mission of Tumacacori being present, together with the officers, the counter, Lorenzo Berdego, the measurers, Juan Estevano Romero, Leon Osorio, and Ramon Rios, and the undersigned assisting witnesses, I order the said counter to measure, as he *did* punctually did measure, a cord well twisted and greased, which I had brought for the purpose, of fifty varas, Castialian, of the usual measure of four palms, measuring the same with a vara properly regulated and marked, which I had brought for the purpose, the said cord having a stick of hard wood attached to each end, which cord was by me delivered to the said measurers, with whom and the other parties mentioned I went to the said place of the burying ground, and being in front of the cross, the point fixed as a centre, I placed a compass properly regulated, which I had also brought for the purpose. I took the direction of the north and down the valley, and then carefully measured and counted fifty cords, the line terminating in front of the devisadero situated between "Lacido al bajo" and two very large alamas, cotton-wood, or poplars standing
23 near the river, at which point I ordered a number of stones to be placed as a sign for a landmark, which was done. Proceeding no further in this direction, because the boundaries of the presidio of Tubac was reached, whereupon, returning to the centre, a direction was taken south, in which direction was measured and counted with equal care three hundred and thirty-two cords, the line terminating at the upper side of the Cuñada, close to the place called Calabazas. From this point, returning to the centre, there was carefully measured towards the east seven cords from the river bed, the line terminating at the foot of the hill within a mesquite grove, at which place I ordered a mound of stones to be placed as a sign for a landmark, and having measured in this direction seven cords we returned to the centre, taking the direction west, where was measured and counted with equal care eleven cords, the line terminating at a hill (tendida) standing on the place called the "mesquite seco," at which point I ordered another mound of stones to be placed as a sign for a landmark; whereupon the measurements were entirely concluded of the lands pertaining to said mission as a "fundo legal" and lands for cultivation.

No other agricultural being found in all the valley or in its neighborhood, and taking some cords of the barren lands in the direction of the east and west, all the said measurement being made to the satisfaction of the officers engaged in making the same
24 and of the interested parties, Juan Legarro, governor, and the other natives of the mission, whereupon the said proceedings were concluded, the measurer signing for himself and in the name of the other officers and governor of the mission who

could not write, with me, the said judge, surveyor, commissioner, and the assisting witnesses, acting in the ordinary form.

MANUEL DE LEON.
JOSE MIGUEL SOTO MAYOR.

Assistant: TORIBIO OTERO.
Assistant: JUAN NEPOMUNSENO GONZALES.

On the said 14th day of January, 1807, I, Don Manuel de Leon, veteran ensign and actual commandant of the presidio of Tubac, judge, commissioner, and surveyor in prosecution of the measurements of the lands for estancia (stock rancho) as directed by the senor brigadier governor intendente of the Province of Sonora, the officers and other parties being present, I asked them if they desired to postpone the measurement until the following day, to which they replied that, since their time was valuable and being then all together, they preferred to continue operations as long as the day lasted. Whereupon I ordered the governor, Juan Legarro, that after consulting with las nijos (the sons) he should proceed to point out the place desired as the centre of the land for the stock rancho or estancia, who designated the place Guebabi, including the mouth of the Potrero, this appearing most suitable for the purpose designed, as also because it had been a pueblo pertaining to this mission where it had always kept the stock.

25 Whereupon the mouth of the river was taken as the centre, at which point I ordered a mound of stones to be placed to mark the central point for the commencement of the measurement in accordance with what had been granted by the senor brigadier, Don Alejo Garcia Conde, governor, intendente, and judge privativo of the lands of these Provinces of Sonora by decree of the 17th day of December, 1806.

In witness whereof I sign with the assisting witnesses.

MANUEL LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

On the 14th day of January, 1807, I, the said Manuel de Leon, veteran ensign and commandant of the presidio of Tubac, in company with the officers appointed, the governor of Tumacacori and his Indians, the assisting, &c., being at the initial point designated of their land, and placing a compass, properly adjusted, a direction was taken to the north, in which direction was measured eighty cords, which was carefully measured and counted, the line terminating at the same monument fixed to the agricultural lands, the same being in one body.

Whereupon, returning to the centre, the direction was taken to the south, in which direction were measured and counted with equal care fifty-five cords, the line terminating in front of the pueblo or ancient mission of Guebabi, on the slope descending towards

26 vada seco (hollow place), where I ordered another mound of stones to be placed as a sign for a landmark, and, the night

coming on, I ordered the measurement to be suspended, to be continued in the morning.

In witness whereof, making this entry in the proceedings, the measurer signing for himself and in the name of the other officers and the interested parties who could not write, with me, the said commissioner, acting in the ordinary form with the assisting witnesses.

MANUEL DE LEON.
JOSE MIGUEL DE SOTO MAYOR.

Assistant: TORIBIO OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

In the ancient and deserted pueblo or mission of Guebabi, on the 15th day of the said month and year, I, the said judge, commissioner, and surveyor, Don Manuel de Leon, accompanied by the officials appointed for the purposes, the parties interested as the centre of those lands, and placing a compass properly regulated, a direction was taken to the east, in which direction was carefully counted and measured twenty-seven cords, the line terminating at a hill (serro), and it being impossible to proceed further in this direction on account of the ruggedness of the country, whereupon the parties interested asked me to give them the remainder of the cords in the direction of the Potrero, which was on the west, and, consenting to their request as reasonable, I ordered to be placed and there was placed at the foot of said hill (serro) of San
27 Cayetna, on the side looking towards south, another mound of stone as a sign for a landmark; whereupon, returning with all the parties mentioned in these proceedings to the initial point, a direction was taken to the west, in which direction were measured carefully and counted thirty-eight cords, the line terminating on the slope of the highest hill seen from the Potrero, at which point I ordered to be placed and there was placed another mound of stones; whereupon the measurements were concluded as well of the agricultural lands as of the two sitios of estancia (stock rancho) to the satisfaction of the officers; whereupon these proceedings were concluded and the same was signed by the said measurer for himself and in the name of the officers and interested parties who could not write, and the same was also signed by me, the said judge, surveyor, and commissioner, and the assisting witnesses with whom I act in the absence of a notary public, in due form of law.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

At the presidio of Tubac, on the said day, month, and year, I, the said judge, Commissioner Don Manuel de Leon, veteran ensign and actual commandant of the company of Tubac, in view of having fulfilled the commission conferred on me by decree of the 17th of December, 1806, issued by the senor brigadier, gov-

ernor intendente, political and military judge, privativo of
28 the lands of these provinces, Don Alejo Garcia Conde, in continuation of these proceedings, ordered that the originals thereof, with citation, be transmitted through the interested parties, in this condition, to the said superior authority, in compliance with the order of the same, to the end that, in view of the same, his honor may determine what might be necessary.

Thus provided, ordered, and signed with the assisting witnesses in the ordinary form.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

On this the date of the above date, January 17th, 1807, these proceedings, contained in nine folios, was delivered to the interested parties, Juan Legarro, governor of the mission of Tumacacori, and the Indians of said mission.

In witness whereof I make this entry, which is signed with a rubrica.

To the senor commandante Don Manuel de Leon:

I, Juan Legarro, governor of the mission of Tumacacori, for myself and in representation of all the community of this mission, appear before your honor through this petition and say that this our pueblo being without papers or instruments in relation to lands which by the lapse of time had been lost, and I clearly and evidently knowing that this mission in the direction of Guebabi is
29 bounded by the rancho of Romero, the monuments of which still exist beyond the Yerba Buena, at which place also exists a corral which was used to be held by our mission and by the Potrero, the measurement reaching as far as the point of the marsh (cienega), and learning from Don Manuel Carrera that the papers had been in his possession, and that these sitios had been in years anterior purchased with the money of the common fund of the mission and natives, which papers have not made their appearance:

Wherefore, for the purpose of justifying before the senor governor, military and political intendente of the royal treasury, and judge privativo of the lands of these provinces, the right we have to said lands, which we claim as proprivs (property), and those that we need at present in consideration of the increase of the stock of our mission, which in times past was few in number, for which reason we did not make this claim—

We pray your excellency to be pleased to hear us and proceed to take the sworn testimony of the Romeros, Apodacas, Baes, and other old residents who are acquainted with the facts stated to you.

At the request of the governor and natives of the mission of Tumacacori.

FRAY NARCISCO GUTIERRIEZ.

Tumacacori, December 23rd, 1806.

30 Don Manuel de Leon, ensign of cavalry and commandant of the presidio of Tubac, in view of the foregoing petition and concerning the same as presented in due form of law, in virtue of the same I proceeded to take the sworn declaration in due form of the parties named below.

At the presidio of Tubac, on the 24th day of the month of December, I, the said commandant, Don Manuel de Leon, caused to appear before me and the assisting witnesses, Juan Nepomuseno Apodaca, a resident of Santa Cruz, to whom I explained the nature of an oath, to which he replied that he knew what an oath was, and he promised by God our Lord and the sign of the holy cross that he would true answers make to such questions as might be asked of him as far as he might know.

Question. If he knew the boundaries or monuments in the direction of the south, as also in the other directions.

Answer. On the side of the south, or where Guebabi is situated, said mission of Tumacacori is bounded by the rancho of the Romeros; that the witness is interested in the rancho of the Romeros, and that he knows that at present exist the monuments which divide the lands of Tumacacori and the Romeros, said monuments being placed beyond the ritos called Yerbabuena, and that in the direction of Potrero he knows and swears that said monuments were placed above the large marsh (cienega grande), and that in the direction of the east the monuments were placed in the cajor of Sonoita on a mesa.

31 Question. As to where he acquired his information he replied that he knew it because he had been present at the rodeos of said mission, and had heard the ministero of said mission say so, and he had heard the late Manuel de la Carrera say that if any doubt should arise as to the lands of said mission—these of the interested parties, those of the Romeros, Santa Barbara, and other places situated in the direction of Guebabi, or in the valley of Potrero—that if they would come to his house they would find the documents necessary.

To the question as to his opportunity of swearing to what he had affirmed in relation to the citizen Manuel de la Carrera he replied that he had heard him speak in relation to the matter, and he knew he had been judge for many years and collected all the papers in relation to the lands and sitios and took them with him.

Question. If he had anything further to state in relation to the matter he said he had nothing more to say; that he was seventy years of age, and not knowing how to write he made a sign of the cross.

And for the necessary ends I signed with the assisting witnesses, with whom I act in the absence of a notary public.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.

Assistant: JUAN NEPOMUSENO GONZALES.

32 On the 7th day of January, 1807, I, the said Manuel de Leon, political judge and commandant of the presidio of

Tubac, caused to appear before me and the assisting witnesses Juan Bantista Romero, sergeant of the company of the presidio of Tucson and a resident of this presidio as havilitado, to whom I explained the nature of an oath and the harm that would result from swearing falsely, to which he answered that he knew his obligations under an oath, and he promised to speak the truth.

Question. If he knew the boundaries of Tumacacori? He replied he did, since childhood; that his late father took him as a child and told him that the mission of Tumacacori was bounded by the ranch of Buenavista, belonging to them (that is, the declarent and his father), and that the landmarks of the Tumacacori are situated above the Yerbabuena, and that Don Manuel Carrera, as political judge of this jurisdiction, assured me that he had in his possession papers in relation to this place and other places in the neighborhood.

Question. If he had anything else to say? He replied that he had nothing further to say; that he was confident as to what he had stated.

And for the end that may be necessary I signed this in the absence of a notary public, with assisting witnesses.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

33 On the 9th day of January, 1807, I, said Don Manuel de Leon, political judge and commandant of Tubac, caused to appear before me Pedro Baes, resident of the presidio of Tucson, to whom I explained the nature of an oath; whereupon he promised to speak the truth in answer to such questions as might be asked him.

Question. If he knew the boundaries of Tumacacori? He answered that the mission of Tumacacori on the south was bounded by the rancho of Buenavista, a ranch belonging to the Romeros, the monuments of which bound the lands of the Romeros near the said mission, and that the landmarks of the mission still exist, although thrown down above the Yerbabuena; that said witness was raised on said rancho of the Romeros, and that the mission held its rodeos on the boundaries of the Yerbabuena, the remains of which are still seen where the Romeros still held their rodeos, and that it is known that they were places purchased by the mission, and that the Corporal Eugenio, whom he raised by the mission and also was corporal of Tucson; that he had been taught to read, and that the documents had been placed in his hands which Corporal Eugenio had learned to read; that on the side of the Potrero the measurements reached as far as the Pajarite, also the large marsh (cienega grange) where the monuments were placed, and on the south as far as the cajor of Sonoita, at a hill very "tendida."

In witness whereof I sign with the assisting witnesses,
34 he saying that he was eighty years of age.

MANUEL DE LEON.

Assistant: TORIBIO DE OTERO.
Assistant: JUAN NEPOMUSENO GONZALES.

To the senor governor intendente and judge privativo of lands, Juan Legarro, governor of the Indians of the pueblo of Tumacacori, situated in the district of Pimaria Alta: Felipe Mendoza, Jno. Ignacio Arrola, Ramon Pamplina, and Javier Ignacio de Madrid, principal natives of the pueblo, for themselves and in the name of and in representation of the community of the natives of said republic, before your honor, in due form of law, through this petition, appear and say that the measurements of lands belonging to said pueblo as a "fundo legal" and as "estancia" being concluded, as shown by the proceedings taken by the commandant and political judge of the military post of Tubac, Don Manuel de Leon, by virtue of the superior decree which your honor was pleased to issue on the 17th day of December last, as is shown by the annexed expediente containing nine written folios, with all the solemnity, present ourselves. The said measurements having been made in accordance with the sovereign decrees in relation to such matters, and having also produced before the official commissioner the judicial proof, which is set forth in three written folios, by which is sufficiently set forth the right of property which we have to the lands, which on the south and the ancient pueblo of Guebabi are bounded
35 by the rancho of the Romeros and further on by the place of Verbabuena, and on the north and the valley of the Potrero as far as the upper point of the large marsh (la cienega grande); on the side of the east bounded by the cajor of Sonoita, which lands and places belong to us by legal, public, and judicial purchase from their primitive and legitimate owners, and that since the time of the Jesuits our said mission of Tumacacori possessed the same as a "fundo," all of which is shown by the respective instruments of sale and transfer executed before the legitimate authority of those ancient owners; which documents were in possession of Don Manuel Fernandez de la Carrera, and since the decease of said individual they do not know where said documents are to be found. The legality: that the same were acquired legally by real sale and by purchase by the mission, as is duly shown by the accompanying judicial testimony, which at our request has been taken by the said commandant and political judge of Tubac. In consideration of which we earnestly pray your honor to be pleased to order to be issued in favor of our said mission the corresponding title or instrument, which in due form, in all time, will show the said measurement and adjudication of lands belonging to us, as well as a "fundo legal" of our pueblo and its respective "estancia," as also the sitios belonging to us by purchase in the time of the primitive missionaries, which is shown by the annexed testimony, and, it being
36 manifest in the constant increase of our stock the land measured to us for "estancia" by the commissioner is not sufficient, we protest formally that we will confine ourselves always to all the boundaries of the said lands as our own by virtue of the legitimate right we have to the same under the title of this superior judge privativo, since what we ask is just and in which we will receive grace and favor, and besides being in accordance with what is provided by his majesty in the royal instructions which govern

the matter, swearing in our favor that we do not proceed in malice, and whatever is necessary.

At the request of the parties present.

IGNACIO DIAZ DEL CARPIO.

ARIZPE, *March 18th*, 1807.

The foregoing petition being presented and admitted, let the same be annexed to the expediente and report accompanying, and let the same be passed to the assessor attorney general, the senor intendente and judge privativo of lands of these provinces. This decree ordered and signed.

GARCIA CONDE.

To the senor governor intendente, at the request of Juan Legarro, as governor of the pueblo of Tumacacori in La Pimaria Alta, for himself and all the community of that republic, there have been measured to the same, by virtue of the decree of your honor of the 11th of December last, the four leagues
37 belonging to the pueblo as a fundo, and besides an estancia (stock rancho), all in accordance with the laws and instructions which govern such matters in this province. The said natives not being contented with said measurement, they ask that there be adjudicated to them the lands occupied heretofore by the abandoned pueblo of Calabasas, the dimensions of which are shown by the testimony taken before the commandante and the political judge of Tubac at the request of said Indians, and are included within the boundaries therein mentioned.

The stock, cattle, and horses of Tumacacori are increasing each day by the industry of the natives under the direction of the present minister, Rev. Father Fray Narciso Gutierrez.

Whereof the whole of said land is considered necessary for the preservation of said stock.

I am of the opinion that your excellency may approve said measurement and adjudicate to that pueblo the lands contained therein as a fundo legal and those contained within the boundary of Calabasas, all without prejudice to third parties who may have a better right, and under the condition that if the said pueblo, which is now abandoned, should again be settled that its lands shall be restored, and that your honor issue a title in due form to these natives for the protection of their rights. Your honor will, however, determine what is proper in the premises.

LICENCIADO TRESIERRA.

38 Arizpe, March 30th, 1807.

In the city of Arizpe, on the 31st day of the month of March, 1807, the Senor Don Alejo Garcia Conde, brigadier of the royal armies, governor political and military intendente of the royal treasury, and judge privativo of sales, compositions, and distribution of lands of the Provinces of Sonora and Sinaloa, by his majesty (whom God preserve). In view of the foregoing proceedings instituted for

the marking out and assignments of the lands which belong to the mission of Tumacacori as a fundo legal of their pueblo and for estancia of the same, and reports showing the lands which, besides those, they have acquired by purchase and which legitimately belong to the natives of the mission, together with the opinion of this intendencia and governor, as has been set forth.

His honor said that, in conformity with the opinion of the Lieutenant Letrada (learned) (in accordance with the surveyor and superior orders in relation to the matter), the said proceedings of measurements and testimony taken by the present commandant and political and military judge of Tubac, Ensign Don Manuel de Leon, adjudication is made in due form to the said pueblo and natives of Tumacacori of the said lands referred to in the expediente, so that as their own property, legally acquired both as a "fundo legal" of the pueblo and estancia, which they need, correspond to them, they shall enjoy the use and freely possess at will and for their own benefit, in community and individually, and for the decent
39 support of the church of said mission, but under the condition that in no case and in no manner shall they alienate at any time any part of said lands which are adjudicated and assigned to them, since they are always to be considered as belonging to the republic and community of natives alone for their proper use, as well as for sowing purposes as for stock raising and the increased prosperity of the same, and under the express condition also that whenever the ancient and deserted pueblo of that mission named Calabasas may be resettled that the lands that legitimately belong*ing* thereto shall be restored to the same, and that the present adjudication is particularly understood to be without prejudice to third parties who may have a better right to the same and who may legally and formally present the same. In conformity with which his honor ordered to be issued by this intendencia and juzgado privativo the corresponding title, in ordinary form, in favor of the said natives of said pueblo for their security in all time and for the other uses and ends that may be necessary, and that this decree will be made known to the parties interested.

Thus provided, ordered, and signed before the undersigned witnesses, with whom I act in the absence of a notary public, according to law.

ALEJO GARCIA CONDE.

Assistants:
RAMON MENDOZA.
JOSE DE BERROTORAN.

40 Whereupon appear*ing* in this juzgado the citizen Ignacio Diaz de Corpio, as the agent or attorney appointed in this matter by the natives of Tumacacori, who was personally notified of the foregoing decree, which he understood, signing the same with his honor and the assisting witnesses.

GARCIA CONDE.
IGNACIO DIAZ CARPIO.

Assistant: RAMON MENDOZA.
Assistant: JOSE DE BERROTORAN.

Whereupon, by virtue of authority conferred by article 81 of the royal ordinanza and instructions to intendentes and in conformity with what is set forth in the royal cedula in relation to this matter of the 15th of October, 1754, referred to in said article, by these presents, in the name of his majesty, whom God preserve, I confer a formal grant and adjudication of lands for agriculture and for the pasturage of cattle, horses, mules, that are set forth and described in the foregoing proceedings of measurement and the testimony of the community of Indians of Tumacacori, situated in the district of Pimeria Alta, in the jurisdiction of the military post of Tubac, which said agricultural lands and those for grazing purposes I concede, give, and adjudicate to the said natives, their children, heirs, and successors, with all its entrances, exits, uses, customs, servitudes, woods, pastures, springs, watering places thereto belonging, including within the measurement demarkation and boundaries, as set
41 forth in the first proceedings, to which the grantees shall be strictly subjected, they, the said Indians of the said pueblo of Tumacacori, not to exceed the boundaries as set forth or to occupy other land than what is adjudicated to them by this title, under the following express conditions:

1. That the survey and adjudication of lands is to be understood to be without prejudice to any party who may have a better right to the same and who may present the same in due form.

2. That whenever the deserted pueblo of Calabasas (which pertains to the mission of Tumacacori) may be resettled the lands corresponding to the — as a fundo legal of the pueblo and stock ranch shall be restored by the natives of Tumacacori.

3. And, last, that the interested parties are to keep the said lands occupied by cultivation and keeping stock thereon, doing all in their power for the advancement of these branches of industry, so that said lands shall not at any time be entirely abandoned or unoccupied, under the penalty that if for the space of three years they are totally abandoned they may be granted to any person who may demand them.

And I strictly order and command the present commandant and political judge of said pueblo of Tubac, and to others in his employ, not to permit the said natives of Tumacacori, for any motive or cause or under pretense, to be molested, prejudiced, or disturbed in the free use and dominion of said lands; but, on the contrary, they
42 shall take care that they be protected in the quiet and peaceable possession of the same, requiring also that the community of Indians shall construct and maintain firm monuments of rough stone and lime of the necessary height and thickness, which shall in all time designate the boundaries of said lands with the colindantes and the vacant lands.

Wherefore and in conformity with and in consequence of what has been determined by me and decree of the 31st of last March, which is inserted, I issue the present title of adjudication, grant, and confirm, in due form, in favor of the said Indians, the community of their Republic of Tumacacori.

Let the necessary registry be made in the corresponding book,

and let the original title be delivered to the interested parties for their security, and that in all time it may serve them as a justifying document of the right of property which they legitimately have in said land.

Given in the city of Arizpe on the 2nd day of April, 1807.

Authorized and signed by my hand and sealed with the seal of my arms before the undersigned and assisting witnesses, with whom I act in the absence of a notary public, according to law.

ALEJO GARCIA CONDE. [SEAL.]

Assistants:

RAMON MENDOZA.

JOSE DE BERROTORAN.

Examined: A rubrica.

Registry: This title remains registered in folio ten of Book 174, which exists in the archives of the juzgado privativo, and in witness whereof I make this entry.

Signed by the rubrica of his honor: (RUBRICA.)

43 In the month of June, 1821, there was measured to Don Leon Herreras, of this vicinity, one and three-quarters square leagues in the place of San Jose Sonoyta by denouncement made before the senor commandante general of this province, Brigadier Don Antonio Cordero, he being intendente of these provinces, which measurement of said league down the cañon of said Sonoyta terminated in front of the two cerritos (little hills) which are named Quates. In this direction it is bounded by the lands of the mission of the pueblo of Tumacacori, and, in consideration of the fact that when said measurements were made, in order not to encroach on the lands granted to the said Tumacacori, they only had in view the measurements made of the "fundo" and two "estancias," it was believed that, so far from encroaching on the measurements of Tumacacori, there remained a vacant space of one league, a little more or less. However, the minister of said pueblo of Tumacacori, Friar Ramon Liberos, having represented in an expediente that, besides the fundo of four leagues and the two estancias measured, more land was given to said pueblo by his excellency the Senor Don Alejo Garcia Conde in both directions, he being intendente of these provinces, and in consideration of the fact that in direction of the east there is some doubt as to the true boundary, in order to avoid difficulty and the necessity of suits, the father (friar) minister, Ramon Liberos, in the name of the pueblo and Don Leon Herreras, having agreed that the line dividing these lands the one from the other
44 shall be the upper part of the cajon of Sonoyta at the hill (loma) called "De las Cruses," and that besides this that in all time the said Herreras may keep stock on the land pertaining to the lower part of the cajon without being prejudiced in the same, and the piece of agricultural land in the said cajon Abajo at no time shall be cultivated by any one else, except by agreement, save the Indians of the pueblo, and by no other persons, to which the parties

agreed before me, the Captain Don Elias Gonzales, commandant of the presidio of Tubac; also asking that the preceding be entered at the end of each of the expedientes in possession of the interested parties as a testimony in the matter. Whereupon the parties signed with me and the assisting witnesses in the absence of a notary public, according to law, on the 10th of January.

IGNACIO ELIAS GONZALES,
For DON LEON HERRERAS.
JOSE MA. SATELO.
FRIAR RAMON LIBEROS.

Assistant: TRINIDAD YRIGOYEN.
Assistant: JOSE ANTONIO SOTELO.

OFFICE OF THE TREASURY DEPARTMENT OF SONORA, 1844.

Title of sale, transfer, and adjudication of agricultural lands, which include the four leagues of the fundo legal of the deserted pueblo of Tumacacori and the two sitios of its estancia (stock ranch) of Calabasas, and the other places thereto annexed, the same being situated in the jurisdiction of the district of San Ignacio,
45 issued by the said departmental treasury in compliance with the superior decree of the 10th of February, 1842, in favor of Don Francisco Alejandro Aguilar, a resident of the post and village of San Fernando de Guaymas:

Second seal. Four dollars. Years 1844, 1845.

Ignacio Lopez, captain of cavalry, retired into the infantry, intendente honorary of the army and treasury department of Sonora: Whereas the superior decree of the 10th of February, 1842, directs, in consideration of the embarrassed condition of the pueblo treasury, the sale of property pertaining to the temporalities as being of this class the agricultural lands and the grazing lands of four leagues of the "fundo legal" of the abandoned pueblo of Tumacacori and the two sitios of the stock ranch of the same in the points of Guebabi Potrero Cerro of San Kayetano and Calabasas; the areas, boundaries, monuments, and colindantes are set forth in the corresponding proceedings; all measurements were made in the year 1807 by the commissioner and surveyor, Don Manuel de Leon, veteran ensign and commandant of the presidio of Tubac, according to the reports that have been made, at the request of this office of the departmental treasury, the said lands (temporalities) being valued at the sum of five hundred dollars, in accordance with the requirements of article 2 of the foregoing supreme decree of the 10th of February, 1842, in compliance with which the formation of the corresponding expediente was ordered through the juzgado
46 of first instance and of the treasury of the district of San Ignacio, and no bids were offered:

Wherefore, in accordance with article 73 of the law of the 17th of April, 1837, the sales being made for a sum exceeding five hundred dollars on account of the national treasury, the treasurer's office proceeded to offer at public sale the lands of the abandoned pueblo of Tumacacori and the lands of its "estancia" (stock ranch)

of Calabasas and the place thereunto belonging, all appertaining to the temporalities, on the 16th, 17th, and 18th of the current month of April, asking bidders for the same. Whereupon no one appeared except the Senor Don Francisco Alejandro Aguilar, of this post and village of San Fernando de Guaymas, who offered the said sum of five hundred dollars, the sum at which the same was valued, as is shown at the last offer of sale, which is as follows:

Third seal. One dollar. Years 1844 and 1845.

At the post and village of San Fernando de Guaymas, on the 18th of April, 1844, I, the undersigned, treasurer of the department, being at the office of the treasury under my charge, with the assisting witnesses, Don Jose Maria Mendoza and Don Vincente Yrigoyen, in the absence of a notary public, in compliance with article 73 of the law of the 17th of April, 1837, since the price or valuation of the temporalities referred to in these proceedings does not exceed the sum of five hundred dollars, I offered the third and last offer of lands to be made at auction of the lands "de temporalities" of
47 Tumacacori and Calabasas referred to in the expediente; whereupon, at the sound of the drum, the auctioneer, Florentio Baldizan, did say in a clear and loud voice, saying: The departmental treasury is going to sell on account of the national treasury, in accordance with the supreme decree of the 10th of February, 1842, the agricultural lands and the grazing lands for cattle and horses included in the four leagues of the "fundo legal" of the deserted pueblo of Tumacacori and the two "sitios" of the "estancia" (stock ranch) of the same, which desert at the places of Guivave Potrero Cerro de San Cayetano and Calabasas, situated in the district of San Ignacio, the areas, monuments, boundaries, and colindantes of which are set forth in the corresponding proceedings of measurements made in the year 1807, by the commissioner, Surveyor Don Manuel de Leon, veteran commandant at the time of the presidio of Tubac, as is shown by the report made at the instance of the departmental treasury, it being also shown by the same that the original title of the grant and confirmation of the said temporalities still exist, which lands have now been valued at the sum of five hundred dollars, in accordance with article 2 of the said superior decree of the 10th of February, 1842.

Whoever may desire to bid let him do so before the departmental treasury, and his bid will be heard in accordance with law, with the understanding that the sale is now to be made to whoever may be the best bidder. Whereupon Don Francisco Alejandro
48 Aguilar, of this post, appeared and bid the sum of five hundred dollars, at which the said temporalities were valued, and, there being no other bidder and the hour of twelve o'clock of the day having arrived, the last offer was made once, twice, three times, going, going, gone; sold to Senor Don Francisco Alejandro Aguilar.

Whereupon said act was concluded, the said agricultural lands and grazing lands of the deserted fundo and estancia de temporalidades of Tumacacori and Calabasas being publicly and solemnly sold to Don Francisco Alejandro Aguilar, of the vicinity of this post, for the sum of five hundred dollars.

In witness whereof and for the necessary ends these proceedings are closed and signed by me, the interested party, and the assisting witnesses.

IGNACIO LOPEZ.
FRANCISCO A. AGUILAR.

Assistant: JOSE MARIA MENDOZA.
Assistant: VINCENT YRIGOYEN.

In which legal terms was concluded the sale of the agricultural lands and the lands for the pasturage of stock included in the four leagues of the deserted "fundo" of Tumacacori and the two sitios of the "estancia" (stock ranch) of Calabasas and the other places thereto, all being the temporalities.

The original expediente remains on file in the archives of the office of the treasury as a perpetual testimony in relation to the matter, it being observed that when the original titles of Tumacacori
49 and Calabazas are received they shall be annexed to those proceedings. Wherefore the agricultural lands and the grazing lands included in the four square leagues of the fundo of the deserted pueblo of Tumacacori and the two sitios of its estancia of Calabazas and the other places pertaining thereunto, all of temporalities in the jurisdiction of the district of San Ignacio, having been sold to Don Francisco Alejandro Aguilar, a resident of the post, for the sum of five hundred dollars, which sum, together with the taxes pertaining thereto, has been delivered in this office of the departmental treasury. In consequence whereof, by virtue of the authority conceded to me by the laws in relation to the matter, as also by the superior decree of the 10th of February, 1842, by the present title and in the name of the Mexican nation and of the superior government, I concede, sell, give, and adjudicate in due form the said lands for agricultural and the grazing lands including in the four square leagues of the deserted pueblo of Tumacacori and the two sitios for estancia (stock ranch) of Calabazas, with the places pertaining thereto, to the said purchaser, Don Francisco Alejandro Aguilar, as a sale and with all the firmness and solemnity required by law, for himself, his children, his heirs and successors, with all its entrances, exits, lands, circumferences, waters, springs, watering places, uses, customs, servitudes, and other things thereunto pertaining within its boundaries, for the said sum of five hundred dollars, for which the same has been sold to the said Don Francisco Alejan-
50 dro Aguilar under the precise conditions that this purchaser and his successors are required to enter into possession, settle upon, cultivate, and occupy the said agricultural lands and the said grazing lands included in the four leagues of the deserted "fundo" of Tumacacori and the two sitios of its estancia of Calabazas without going beyond the boundaries of the same or allowing the same to be entirely abandoned, with the understanding that if the same should be totally abandoned for the period of three consecutive years from the neglect and fault of the owners and possessors and the same shall be denounced by any person in that event, after the necessary

proceedings, the same shall be declared vacant and be sold at public auction, on account of the national treasury, to whoever may be the highest bidder, excepting as in just such cases as that the abandonment has been on account of a notorious invasion by the enemies or on account of epidemics or other similar causes and for only such time or times as such causes may exist, requiring, as is strictly required, the Senor Don Francisco Alejandro Aguilar and his successors to subject themselves to the appurtenances, extent, and boundaries of the said lands of the fundo Tumacacori and its estancia of Calabazas, maintaining on said possessions the necessary monuments of rough stone and lime, under the penalty established by the laws in case of neglect of the same; and, by the authority which they and other superior dispositions concede to me, I
51 order and require, respectively, the judge, justices, and local authorities now existing and such as may hereafter exist in the district of San Ignacio that in the prompt administration of justice and in observance of the said legal disposition they shall not permit the said Senor Don Francisco Alejandro Aguilar or his successors to be disturbed or molested in the free use, exercise, ownership, dominion, and possession of the said agricultural lands and grazing lands of the fundo of Tumacacori and "estancia" of Calabazas; but, on the contrary, they shall take care that they always be protected and maintained in the quiet and peaceable possession to which they are entitled under the law, so that they may freely enjoy, possess, sell, exchange, donate, transfer, give as a legacy, cede, and alienate the said agricultural lands and grazing lands of the four leagues of the fundo of Tumacacori and of the two sitios of its estancia of Calabazas and the other places pertaining thereto, at their free will and election, as absolute owners of said possessions, it being observed that as soon as the original titles of said lands may be obtained they shall be annexed to this document, since from this time it is considered that said primitive documents are in fact transferred and delivered to the interested party, Don Francisco Alejandro Aguilar, in which terms this title of sale, transfer, and adjudication is issued in due form to the said Senor Aguilar, his heirs and successors, delivering him the first for his security and other uses that may be necessary, previously making registry thereof in the corresponding book.

52 Given at the post and village of San Fernanda de Guaymas on the 19th day of the month of April, 1844, authorized and signed by me, the departmental treasurer, sealed with the seal of this office of the treasury, before the undersigned assisting witnesses, in the absence of a notary public, according to law.

IGNACIO LOPEZ. [SEAL.]

Assistant: JOSE MENDOZA.
Assistant: JOSE DIEGO LABANDERO.

Year 1869. [SEAL.]

(Endorsed:) Filed Dec. 22nd, 1879. John Wasson, U. S. surveyor general. Court of first instance of Guaymas.

II.

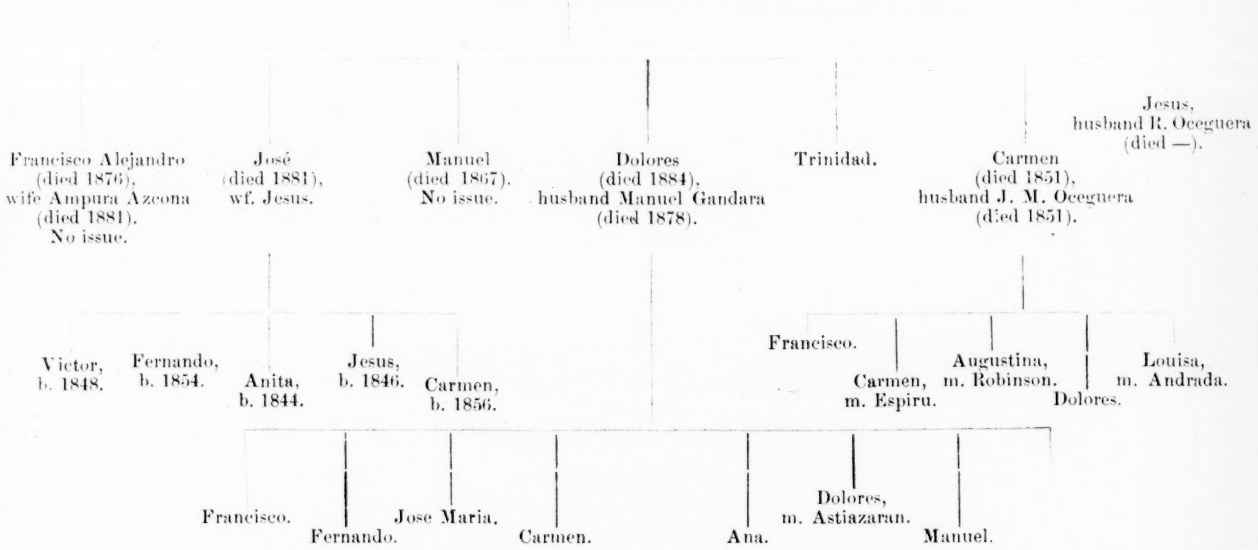
Defendants admit that the father of Francisco A. Aguilar is dead, and that Francisco Alejandro Aguilar died August 27th, 1876, at the city of Guaymas, Sonora, Mexico. He was married to Ampara Azcona some time in 1856. His wife died November 19th, 1881. They had no children whatsoever, and no administration has been issued in this Territory upon the estate of either.

III.

The following is the family tree of Francisco A. Aguilar:

FAMILY TREE.

Victor Aguilar (father) and Maria Escabosa (mother), both dead.



All the above living heirs are over twenty-one years of age.

54 Witnesses were introduced and the following facts prove by them:

Victor Aguilar, the father, married to Ana Maria Escobosa.

Their children and their descendants are as follows:

Francisco A. Aguilar, married to Ampora Azcona, in the city of Guaymas, some time in the year 1856. Francisco A. Aguilar died August 27th, 1876; his wife died Nov. 19th, 1881.

Manuel Aguilar, died without issue *or* about 1867.

Jesus Aguilar, married with R. Oceguera; her husband died, and she is now living as a widow at Guaymas.

Trinidad Aguilar, a single lady, now living at Hermosillo.

Jose Aguilar, married to Jesus Aguilar. Jose Aguilar died on January 4th, 1881, leaving by his said wife the following children: Victor Aguilar, born 1848; Fernando Aguilar, born 1854; Anita Aguilar, born 1844; Jesus Aguilar, born 1846; Carmelita Aguilar, born 1856, all of whom are living now at Hermosillo.

Dolores Aguilar, married Manuel M. Gandara. Dolores Aguilar died April 12th, 1884, and M. M. Gandara died Oct. 4th, 1878. They left the following children:

Francisco Gandara, Fernando Gandara, J. M. Gandara, Ana Gandara, Manuel Gandara, Carmen Gandara, Dolores G. de Astiarxaran; all of whom are over twenty-five years of age.

Carmen Aguilar, married J. M. Oceguera, both of whom died — 1851, leaving the following heirs:

Francisco Oceguera, Carmen O. de Sprin, Augustina O. de
55 Robinson, Dolores Oceguera, and Luisa O. de Andrade, all of whom are over twenty-five years of age.

Manuel Maria Gandara died October 4th, 1878.

Francisco Oceguera, one of the plaintiffs, testified that he transferred eleven-twentieths of his interest in the property in question to Santiago Ainsa for the nominal consideration of one dollar, and authorized him to sue for the said property; that he did not know who was paying the expenses.

IV.

Deed from Heirs to Ainsa.

This indenture, made the 21st day of May, in the year of our Lord one thousand eight hundred and eighty-seven, between Louise G. Bustamante, Jesus Aguilar de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augusvina O. de Robinson, Dolores Oceguera, all of the port of Guaymas, Sonora, Mexico, the parties of the first part, and Santiago Ainsa, of Tucson, Arizona Territory, United States of America, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one hundred dollars, money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, and sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all
56 that certain lot and parcel of land situate, lying, and being

in the county of Pima, Territory of Arizona, in the United States of America, and bounded and particularly described as follows, to wit: Eleven-twentieths ($\frac{11}{20}$) undivided interest in and to all the right, title, and interest which the parties of the first part have in and to all lands and real property and estate in the said county of Pima, Territory of Arizona, United States of America, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LUISA G. DE BUSTAMENTE. [SEAL.]
AUGUSTINA O. DE ROBINSON. [SEAL.]
DOLORES OCEGUERA. [SEAL.]
FR. OCEGUERA. [SEAL.]
JESUS A. DE OCEGUERA. [SEAL.]
CARMEN O. DE ESPRIU. [SEAL.]

Signed, sealed, and delivered in presence of—
FERNANDO M. ASTIAZARAN.

Duly acknowledged on the 21st day of May, 1887, and recorded June 25th, 1887, at 3.30 p. m., in the office of the recorder of deeds, &c., for Pima county, Arizona.

57 V.

Deed from Francisco Gandara, Miguel Gandara, Jose M. Gandara Ana Gandara, Carmen Gandara, and Trinidad Aguilar to Santiago Ainsa, dated April 16th, 1887; consideration, $100; conveys undivided eleven-twentieths interest in and to all property and estate owned by said parties of the first part in the county of Pima, Territory of Arizona.

Duly acknowledged on 16th day of April, 1887, and recorded June 25th, 1887, at 3.30 p. m., in the recorder's office of Pima county aforesaid.

VI.

Deed from Victor Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, and Carmen Aguilar, being the only children of Jose Aguilar, to Santiago Ainsa, dated April 14th, 1887; consideration, $100; conveys undivided eleven-twentieths interest in and to all property and estate in the said county of Pima which the said parties of the first part have by inheritance or by any title.

Duly signed and acknowledged on the fourteenth day of April, 1887, and recorded on the 25th day of June, 1887, at 3.30 p. m., in the recorder's office of Pima county aforesaid.

VII.

Deed from Dolores G. de Astiazaran to Santiago Ainsa, dated May 21st, 1887, conveys undivided five-twentieths interest in and
58 to all real property and estate in the county of Pima, Territory of Arizona.

Duly signed and acknowledged May 21st, 1887, and recorded June 25th, 1887, at 3.30 p. m., in the office of the recorder of Pima county.

VIII.

It is stipulated that all of said deeds were in form identical with the one above set forth at length and numbered.

IX.

Deed from Ainsa to Ely.

Know all men by these presents that I, Santiago Ainsa, of the county of Pima and Territory of Arizona, party of the first part, for and in consideration of the sum of ten dollars cash in hand to me this day paid by Frank Ely, of the city of Saint Louis, State of Missouri, party of the second part, the receipt whereof is hereby acknowledged, and in consideration of the performance by the said party of the second part of certain conditions and trusts to be hereafter set forth and fully stated in a declaration of trust to be made and executed by the said party of the second part, have granted, bargained, sold, and conveyed, and by these presents do hereby grant, bargain, sell, and convey, unto the said party of the second
59 part an undivided five forty-eighths interest to himself and his heirs forever of all my right, title, and interest of every nature, kind, character, and description whatsoever, either in law or in equity, in and to all the following-described lands, lying, being, and situate in the county of Pima, Territory of Arizona, being all of the interest of the said party of the first part in and to all lands, tenements, and hereditaments and appurtenances, or estate or interest conveyed, granted, bargained, or sold to the said party of the first part by the following persons, to wit: By Francisco Gandara, Miguel Gandara, Jose Maria Gandara, Carmen Gandara, Ana Gandara, and Trinidad Aguilar, by their certain deeds made, executed, and delivered on the 16th day of April, 1887, and duly acknowledged by them before Gabriel M. Peralta, notary public, at Hermosillo, Republic of Mexico, upon said 16th day of April, 1887;

By Victor Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, and Carmen Aguilar, by their certain deeds made, executed, and delivered on the 14th day of April, 1887, and duly acknowledged by them before H. S. Gabilondo, notary public, at Hermosillo, on the 14th day of April, 1887;

By Luisa G. de Bustamente, Jesus Aguilar de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, and Dolores Oceguera, by their certain deed made, executed, and de-

livered on the 21st day of May, A. D. 1887, and duly acknowl-
60 edged by them before Fernando M. Astiazaran, notary public, at Guaymas, Mexico, on the same day;

And by Dolores G. Astiazaran, by her certain deed made, executed, and delivered on the 21st day of May, 1887, and duly acknowledged by her before A. Willard, consel of the United States at Guaymas, on the same day.

And I have also granted, bargained, sold, and conveyed, and by these presents do hereby grant, bargain, sell, and convey, unto the said party of the second part all of the balance and residue of my right, title, and interest in and to all of the above-described land as trustee; the said party of the second part as such trustee is to bring and institute and prosecute to final judgment all necessary suits or actions at law or in equity for the purpose of recovering all of the said land and property from any and all persons now in possession of said land or property or any part thereof, and to institute and prosecute to final judgment all necessary suits or actions at law or equity as may be required against each and every person whomsoever who may claim or assert any right, title, or interest of any nature or character whatsoever in or to any of the above-described lands or property (except the persons named as the *cestuis que trust.* under that certain declaration of trust to be made and executed by the party of the second part as trustee), and in the event that the said party of the second part, trustee, shall fail, neglect, or refuse to make and execute the declaration of trust herein provided for, or shall fail or refuse, or for any cause be unable to fully
61 carry out and perform the conditions and provisions set forth in this deed and in the declaration of trust to be made and executed in connection with this deed, then Rochester Ford, of St. Louis, in the county of —— and State of Missouri, may be, and is hereby, fully authorized to designate in writing some other person to act as trustee in the premises; such other person when so appointed as trustee shall have all rights, power, and authority hereby granted and conferred upon said party of the second part as trustee:

To have and to hold an undivided five forty-eighths interest in and to the above granted and conveyed premises, land, and property unto the said party of the second part, his heirs and assigns forever; and to have and to hold the balance and residue of the above granted and conveyed premises, lands, and property unto the said party of the second part as trustee, his successor or assigns forever, together with all and singular the improvements, appurtenances, and hereditaments thereunto belonging or in anywise appertaining, upon the terms, conditions, and considerations expressed in this instrument and for the purposes set forth in the said declaration of trust herein provided for.

In witness whereof the said party of the first part hath hereunto set his hand and seal this 22nd day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

SANTIAGO AINSA. [SEAL.]

Witnesses:
S. M. FRANKLIN.
EARLL H. WEBB.

62 Duly acknowledged June 22nd, 1887, and recorded in the recorder's office of said county of Pima, Territory of Arizona, on the 25th day of June, 1887, at 3.45 p. m.

It was stipulated that the trust mentioned in the last deed was as to four forty-eighths for Ainsa and the remainder for Rochester Ford and L. M. Jacobs.

Plaintiffs rest.

X.

It is admitted that the following documents were signed at the time and place and by the persons when, where, and by whom they purport to have been signed.

PORT OF GUAYMAS, *March 31st*, 1856.

Before me, Pedro de Valois, judge of the 2nd inst. of the district, appeared to-day Mr. D. Francisco A. Aguilar, of this city, exhibiting the present title, consisting of 39 written sheets, which proves his right, acquired legally and legitimately, to the lands and which therein are expressed, which he has made over to Mr. Manuel Maria Gandara with the same rights and concessions that he himself had received from the general treasury of the State, that he may have power as absolute owner and propriêtor thereof to dispose of them as might best suit his convenience or interests.

63 Thus I certify that he executed the document and signed it in my presence and that of the witnesses.

P. DE VALOIS.
F. A. AGUILAR.

Witnesses:
QUIRINO ROSAS.
LORENZO POMPA.
JESUS GONZALES MENSES,
National and Public Secretary (Notary), Resident of this City.

I certify with all power of law that the signature with which is provided the foregoing deed of transfer, and which is "P. de Valois," is the signature of the said judge, who at the time was judge of the 1st instance of Guaymas, as he states, and that it is the same signature which he habitually uses in all his business, public and private, and that as such it is to be considered of good faith and credit in judicial business and otherwise.

In witness whereof I thus certify and sign this certificate in the city of Hermosillo, State of Sonora, in the Republic of Mexico, on the tenth day of October, one thousand eight hundred and sixty-one.

[RUBRICA.] JESUS MENESES,
E. Ni. y P. (National & Public Notary).

The said document is endorsed upon a copy of the "expediente," written upon 39 sheets of official paper, with the seal of the years 1856–'7 engraved and the seal of the Republic of Mexico stamped on each sheet, and which is certified as follows:

"It (this copy) agrees with its originals, which are in the
64 possession of Don Manuel Maria Gandara, at whose request this copy has been made on these thirty-nine sheets with the proper seal, and I authorize the same, signing with my assisting witnesses.

RAMON T. CUEN.

Witness: J. GABRIEL SALCIDO.
Witness: JESUS P. FURTEL.

Lic. Jose de Aguilar, governor of Sonora.

I certify that the signature which precedes, of Ramon T. Cuen, judge of the first instance of civil matters of the district of Ures, is that which he uses and employs in all his official acts.

In witness whereof I give these presents at Ures this 27th day of March, 1858.

JOSE AGUILAR.

Government of Sonora.

The original document of which the foregoing is a translation was produced on the trial by the surveyor general of Arizona, and is endorsed: "Filed in surveyor general's office June 9th, 1864. Levi Bashford, surveyor general."

XI.

Deed from Aguilar to Gandara.

(1869.)

In the city of Guaymas of Zoragoza, on the second day of the month of March, 1869, before me, Jose Bustamente, judge of first instance of the district, the ordinary assisting witnesses, with
65 whom I act for want of a notary public, and the instrumental witnesses, who will be mentioned at the end of this instrument, appeared Don Francisco A. Aguilar and Don Miguel Gandara, in representation of his father, Don Manuel Gandara, as shown by the general power executed in his favor in the city of San Luis Potosi on the 28th of January, 1868, before the notary, Don Isadoro Cobrello, which power I certify that I have seen, and the first having proved himself to be solvent with the pueblo (public) treasury and registered in the registry of the national guard, as shown by the certificates presented, which I also certify that I have seen, both of lawful age, the first a resident of this city, and the second of Ures, who said that consulting their mutual interests that they agreed in the sale of the lands called Tumacacori, Calabasas, and Huebabi, situated in the territory of Arizona, belonging to the United States, which lands belong to the vendor by virtue of a title of sale, transfer, and adjudication in his favor by the treasury of the department of Sonora in the year 1844, all of which is based on a primitive title issued in 1807 for the said lands to the natives of Tumacacori as a fundo legal of their pueblo and estancia (stock rancho) for the same,

by virtue of which they being in full dominion to the said Don Francisco A. Aguilar; and, in order to carry out the said sale in due form of law, the said Don Francisco declares that he gives, as sale to Don Miguel Gandara, in representation of his father, Don Manuel Maria Gandara, said lands, declaring that he has not
66 sold, alienated, or mortgaged the same; that they are clear of all responsibility and encumbrances; as such he sells the same, with all their uses and servitudes and all things thereto annexed that they have had or have pertaining thereto, according to law, for the sum of four hundred and ninety-nine dollars, which they have secured to their entire satisfaction, and the said sum being paid and satisfied, he executed in favor of Don Miguel Gandara, in representation of his father, Don Manuel Maria Gandara, the receipt. He also declares that the said amount of $499 is the just and true value of said lands, the ownership and dominion of which he renounces, cedes, and transfers in favor of the representative of Senor Gandara, so that he may dispose of the same as a thing belonging to him, acquired by just and legal title, and that he may take the possession that of right belongs to him; and since the delivery of the money does not appear, he renounces the law 9, title I, partida 5, and finally he obligates himself for the security of this place; and in the same act Don Miguel Gandara, to whom I certify the title referred to was delivered, as also the accompanying map, in representation of his father, Don Manuel Maria Gandara, said that he accepted this writing in all its parts, both parties obligating themselves to the fulfillment of what is set forth in the same, with all their property, present and future, declaring that there is
67 no fraud or deceit in the matter, and if there should be, in large or small amount, they make of the same mutual donation final and irrevocable, renouncing all right of action and the time allowed by law for commencing the same. Thus they said and signed, being advised that this document was to be registered in the office of mortgages within the term of eight days, the taxes being personally paid into the public treasuary under the penalty of the nullity of this instrument if the same should not be done.

The citizens, Angel Rodrigues, Juan Encinas, and Rafael S. Canez, who are present. Having witnessed which I attest.

FRANCISCO A. AGUILAR.
MIGUEL GANDARA.

Instrumental w's: ANGEL RODRIGUES.
Instrumental w's: JUAN ENCINAS.
Instrumental w's: RAFAEL CANEZ.
Before me: JOSE BUSTAMENTE.
Assistant: CHARLES R. VALENZUELA.
Assistant: EDWARDO MORALES.

March 3rd, 1869, the sum of $24.95, the corresponding tax of five per cent. on the sum of $499 for the transfer of dominion, as set forth in the foregoing deed, has been paid by Don Miguel Gandara

in representation of his father, Don Manuel Maria Gandara, with the corresponding impost of 25 per cent. Federal tax.

GUAYMAS, *March* —, 1869.

This deed remains registered in folio 2, verso, and 3 front of the respective book; all of which I authorized and signed with the assisting witnesses.

JOSE BUSTAMENTE. [SEAL.]

68 Assistants:

CARLOS R. VALENZUELA.
JOSE MARIA VIZCANO.

The original document, of which the foregoing is a correct translation, was produced at the trial by the surveyor general of Arizona, and is endorsed:

"Filed Dec. 22nd, 1879. John Wasson, surveyor general."

The said deed was recorded in the office of the county recorder of the county of Pima, Territory of Arizona, on the 20th day of July, 1869.

XII.

Power of Attorney. Gandara to Andrade.

Letter of attorney dated July 1st, 1876, Manuel Maria Gandara and Miguel Gandara to Guillermo Andrade, authorizing him to enter into and take possession of said premises, to grant, bargain sell, and convey the same or any part thereof for such price or sums and upon such terms as he may deem best; to execute deeds, etc., receive purchase-money, etc., give receipts, etc., etc.

(Endorsed:) "Filed Dec. 22nd, 1879. John Wasson, U. S. surveyor general."

XIII.

Deed. Gandara to Sykes.

Deed dated July 24th, 1877; recorded January 27th, 1879. Manuel Gandara and M. Gandara, by their attorney-in-fact, Guil-
69 lermo Andrade, to C. P. Sykes, in fee for same premises.

(Endorsed:) "Filed Dec. 22nd, 1879. John Wasson, U. S. surgen'l."

XIV.

Deed. Sykes to Curry.

Deed dated Nov. 26th, 1878; recorded same day. C. P. Sykes to John Curry, in fee, undivided interest in same premises.

Endorsed: "Filed Dec. 22nd, 1879. John Wasson, U. S. surveyor gen."

XV.

Deed. Sykes & Curry to the Calabasas Land and Mining Co.

Deed dated Dec. 18th, 1879; recorded Feb. 5th, 1879. C. P. Sykes and John Curry to the Calabasas Land and Mining Company, in fee, for the same premises.

XVI.

Deed. Calabasas Land and Mining Company to Santa Rita L. & M. Co.

Deed dated September 21st, 1881; recorded same day. The Calabasas Land and Mining Company to the Santa Rita Land and Mining Company, in fee, for same premises.

70

XVII.

Deed. Gandara to Jones.

TERRITORY OF ARIZONA, }
First Judicial District. }

This document (agreement), made this 6th day of July, A. D. 1864, between W. Claude Jones, party of the first part, and Manuel Gandara, party of the second part, both residents of Tucson, in the said Territory, declares—

That the party of the first part, lawyer and attorney (may mean district attorney), for and in consideration of what is hereafter mentioned, promises, agrees, and firmly binds himself to present for the confirmation and perfection, until their final confirmation in due form before the courts and respective legal bodies of the United States, the titles to the lands of "Calabasas," "Tumacacori," and "Guevavi," pertaining to the party of the second part, and situated in said Territory, and to take all the necessary steps to procure and obtain the confirmation and final perfection of the said titles, and to perfect the said titles in conformity with the treaties existing between Mexico and the United States without costs or expenses whatsoever to be incurred by the said Manuel Gandara, party of the second part: and, furthermore, the said party of the first part binds himself and agrees to defend and secure the rights of ownership and possession to all the lands of the said Manuel Gandara that are situated
71 in the aforesaid Territory, without costs or expenses whatsoever, to said Manuel Gandara, party of the second part.

And the said party of the second part, for and in consideration of the aforesaid grants, makes over and transfers, in his own right, to said W. Claude Jones, party of the first part, and to his heirs forever, the lands of "Guevavi," situated in the aforesaid Territory, taking for a centre a heap of stones on the bank of the river, placed there on the 14th day of January, in the year of our Lord 1807, by

Mr. Manuel de Leon, chief magistrate of the town and actual commandant of the presidio (military garrison) of Tubac, commissioned judge, surveyor, etc., according to the judicial proceedings, and running from said centre towards the south, a line measuring two thousand seven hundred and fifty varas, to a heap of stones beyond the old town mission of "Guevavi," on the very brow of the hill whence you descend to the low land, which extends to the dry ford, and measuring from the said centre towards the north two thousand two hundred and fifty varas, and from the said centre measuring two thousand five hundred varas towards the west and two thousand five hundred varas to the east, thus embracing in all which is hereby transferred or made over a farm for rearing cattle of five thousand Spanish varas square.

For him to hold and possess said granted land, with all the rights and privileges pertaining thereto, unto the said W. Claude Jones and his heirs in his own right forever.

72 In witness whereof the parties of the first and second parts have hereunto set their hands and seals on the day and year heretofore mentioned.

W. CLAUDE JONES. [SEAL.]
M. GANDARA. [SEAL.]

Signed and sealed before the following witnesses:
GREGORY P. HARTE.
C. TRUMBULL HAYDEN.

XVIII.

Petition of Gandara.

TERRITORY OF ARIZONA:

In the Matter of the Claim of DON MANUEL GANDARA to the Lands of Tumacacori, Calabasas, and Huevavi.

To the Hon. Levi Bashford, surveyor general of the United States for the Territory of Arizona:

Your petitioner, Manuel Gandara, a native of the Republic of Mexico and a resident of Tucson, Arizona, respectfully represents that he is the owner in fee simple of a grant of land containing six leagues in the first judicial district of Arizona aforesaid, in the valley of the Santa Cruz river, known as the lands of Tumacacori, Calabasas, and Huevavi; that said lands originally belonged to the missions of Huevavi and Tumacacori, with the pueblos of natives (Pimas or Papagoes) thereto annexed and dependant thereon; that the said missions became abandoned and depopulated, the
72 former about the year 1767 and the latter in the year 1828; that after the abandonment and depopulation of the pueblo mission of Huevavi the natives of the pueblo and mission of Tumacacori, among whom were many natives of the abandoned Huevavi and pueblo of Calabasas, having lost their original title papers, which bore date shortly after the establishment of Huevavi, in

1690, and wishing to renew said title papers and to augment their means of raising cattle by an increase of pasturage, through their governor, Juan Legarro, a native of Huevavi, and the principal inhabitants of the said pueblo mission of Tumacacori, in the year 1806, solicited Don Alejo Garcia Conde, political and military governor and intendent of the royal treasury (real hacienda) and special judge (juez privativo) of the lands of the Province of Sonora and Sinaloa, to measure and set apart to them the four leagues belonging to said pueblo mission of Tumacacori and also for the "estancias" or an extension of land for grazing purposes in the old pueblo mission of Huevavi, the place of Calabasas, and the Boca del Potrero; that the said governor, Alejo Garcia Conde, on the 17th day of December, in the year 1806, issued a decree to Manuel de Leon, alfirez veterano, actual commandant and political judge of the military post of Tubac, requiring that he should measure and place the said natives of Tumacacori in possession of four square leagues of land, to be measured according to the cardinal points or wherever it might be most useful to them and the nearest adjoining them, and
74 also at least two leagues of grazing lands, "estancias por ganado mayor," for the raising of large cattle wherever it best suited the said natives of Tumacacori; that afterwards the said Don Manuel de Leon, alfirez veterano and actual commandant of Tubác, after due legal notification, on the 14th day of January, 1807, commenced the measurement of said land in accordance with the decree of the governor, Don Alejo Garcia Conde, and in due form of law; that in the measuring of the said land he took for the centre the cross fixed in the cemetery of the said mission of Tumacacori, from which cross he measured two thousand five hundred varas north to the boundaries of the military post (presidio) of Tubac and fixed a monument of stone on the boundary near two large cottonwood trees on the banks of the Santa Cruz river; returning to the centre, he measured from thence to the south sixteen thousand six hundred varas to a point on the side above and near the mouth of the cañada close to the place (sitio) of Calabasas; he then measured on each side the cultivatable or grain-bearing land (tierras de pan llevar) three hundred and fifty varas to the east and five hundred and fifty varas to the west, marking the boundaries with a monument of stone, and, not being able to find any other cultivable land in the whole valley, the said Manuel de Leon, with his assistants and the parties interested, measured on both sides, east and west, in the unfruitful and unproductive land sufficient to make up the four
75 leagues to the satisfaction of all concerned; that on the said 14th day of January, 1807, the said Manuel de Leon, with his assistants and the parties interested, selected a centre for the measurement of the two leagues of grazing lands at the place called Huevavi, including the Boca del Potrero; that the said centre was fixed in the meadow plain (vega) of the river Santa Cruz, where he placed a monument of stones as the starting point; he then measured from said centre north four thousand varas to the monument of stones placed at the boundary of Calabasas near the mouth of the cañada; returning thence to the centre, he measured south two

thousand seven hundred and fifty varas to a point beyond (adelante) the ancient mission of Huevavi, on the top (cuesta) of the hill, where the road passes from the wall (tapia) below to the dry ford (vado leco), where he placed a monument of stones; that on the 15th day of January, 1807, he commenced at the central point and run east one thousand three hundred and fifty varas to a precipitous mountain, where he could measure no further; he there placed a monument of stones and returned to the centre, when the parties interested asked that he should give them the remaining measure in the direction of the Potrero, which lay to the west, and in conformity with their solicitation he measured westward and placed a monument of stones on the side of the cerro Cayetano that look to the south, and, returning to the centre, he measured west
76 nineteen hundred varas to the slope of the highest hill seen from the Potrero, where he placed a monument of stones; the survey was then concluded to the satisfaction of all parties; that the said measurement of land was reported and confirmed by the proper authorities of the Province of Sonora and Sinaloa and a title decreed on the second day of April, in the year 1807, to the extent of six leagues, extending from the presidio of Tubac on the north to beyond Huevavi on the south, bounded by the rancho of Buena Vista of the Romeros and on the east by the cañon of Sonoita and on the southwest and west by the valley of the Potrero above the Cienega Grande and the mountains; all of which will more fully appear by reference to a copy of the original title papers herewith filed and made a part of this petition.

And your petitioner avers that said pueblo and mission of Tumacacori gradually decayed, until it was finally abandoned, in the year 1828, and, becoming depopulated, the lands reverted to the Mexican Republic as a part of the public domain, and by a decree of the Mexican Government of the 10th of February, A. D. 1842, providing for the valuation, sale, and disposition of the public lands (fondo legal) of the republic, Don Ygnacio Lopez, honorary intendent of the territory of the department of Sonora, at the solicitation of the treasurer of the said republic, took the legal and necessary steps for the sale of the mission lands of Tumacacori and the two sitios (estancias) of Huevavi, Calabasas, and Potrero; and by means of the court of the first instance of the treasury (hacienda), in the
77 (partido) district of San Ygnacio, the same lands were valued at five hundred dollars and offered for sale for the benefit of the public treasury to the highest bidder, in accordance with all the requisitions of the law; that your petitioner, being absent in the city of Mexico at the time, authorized Don Francisco Alejandro Aguilar, a member of his family, to bid for and purchase the same, which he did with the means and under the direction of your petitioner, and that in accordance with law the said land was offered for sale to the highest bidder, and on the 18th day of April, A. D. 1844, the said Francisco Alejandro Aguilar became the purchaser of the said lands of Tumacacori and the "estancias" of Huevavi, Calabasas, and Potrero, as the agent of your petitioner, for the sum of five hundred dollars, he being the highest, the last, and the best bidder,

in accordance with the requisitions of the law, and the corresponding title deeds were legally made to him by the said Ygnacio Lopez, honorary intendent of the treasury as aforesaid, according to the measures and limits as expressed and set forth in the original title papers in the expediente granted in 1807 to the natives of Tumacacori, a copy of which original title papers as made out by the said Don Ygnacio Lopez, honorary intendent as aforesaid, is herewith shown and made a part of this petition.

78 And your petitioner further avers that he took actual possession of the lands so sold and transferred as soon thereafter as practicable, at great cost and sacrifice, owing to the continuous hostilities of the barbarous tribes; that in the year 1851 he placed upon the said lands of Tumacacori and the estancias of Huevavi and Calabasas about three hundred head of sheep, goats, and hogs, with mules, oxen, and carts sufficient to commence the establishment of a rancho and the building of a town and settlement; that he expended thirty-two thousand dollars in the stocking of said lands and the rebuilding and improving the pueblo of Calabasas; that Pedro Chambon and others had charge of his interests on said lands, and that they remained there until after the cession of the country to the United States by the treaty of 1854 and the withdrawal of the Mexican garrisons, when, from want of protection and the hostilities of the Indians occasioned by said withdrawal of troops, most of said stock was driven into Sonora, the remainder was stolen by tho Apaches or is running wild, — the greater part of the employees on the land left at the same time. Some Germans, however, remained as your petitioner's lessees at Tumacacori, where they severally lost their lives by the Apaches until the last man was killed, in the year 1862; and since that time a portion of said lands was rented to an American, who also lost his life by the Apaches, and up to the present time it has been almost impossible to settle upon and occupy said land continuously.

79 Your petitioner further avers that the said Francisco Alejandro Aguilar delivered — him the expediente and the title papers to the said lands immediately after the purchase as aforesaid, and he went into possession of the same and occupied them as above specified, but that a formal transfer was not made until the thirty-first day of March, A. D. 1856, when the said Francisco Alejandro Aguilar transferred his nominal right in said lands to your petitioner, in whom the legal right vested at the time of the purchase, in 1844, the original of which transfer is herewith shown and made a part of this petition.

Your petitioner further alleges that his title to the said lands thus derived is perfect and absolute under the laws of Spain and Mexico and according to the decisions of the Supreme Court of the United States; that the conditions are all subsequent and complied with by the continued occupation of the land, except when rendered impossible by the hostilities of the barbarous tribes.

Your petitioner prays that his title may be placed on file, investigated, and the necessary testimony taken, and his claim surveyed according to the original title papers and the laws of Spain and Mex-

ico, in order that the same may be reported on and confirmed in accordance with the provisions of the treaty of Gaudalupe Hidalgo of 1848, and the Gadsden treaty of 1854, and the laws of the United States, as well as the act of Congress of the 22nd of July, 1854, entitled "An act for the establishment of the office of surveyor general in New Mexico."

Respectfully, MANUEL GANDARA,
By his attorney, W. CLAUDE JONES.

(Endorsed:) Filed June 9, 1864. Levi Bashford, surveyor general.

80 XIX.

Petition of Sykes and Curry.

Petition.

To the Hon. John Wasson, U. S. surveyor general for Arizona:

The petition of John Curry and Charles P. Sykes respectfully represents that they are the owners, under various mesne conveyances from the original grantees and denouncers, of a certain tract of land or rancho situated in the county of Pima, in the Territory of Arizona, known by the name of "Tumacacori and las Calabasas," a particular description of the location and boundaries of which tract of land or rancho is clearly and explicitly given in the original expediente of the title, a duly authenticated copy of which is hereto annexed, marked Exhibit "A," with a correct translation thereof, marked Exhibit "B," and which are made a part of this petition.

Your petitioners further represent that the original title papers set forth the following historic facts:

1st. That in the year 1806 Juan Legarro, governor of the Indian pueblo of Tumacacori, situated in the jurisdiction of Pimaria Alta, petitioned Don Alejo Garcia Conde, intendente of the province and of the royal treasury, political and military governor, and juez privativo, to issue to the Indians of the pueblo of Tumacacori a grant of lands for the "fundo legal" of the pueblo and also for the
81 "estancia" (stock farm) of the pueblo, the grant asked for to replace the ancient title papers which had been given by the Spanish Government to the Indians of said pueblo and which had been lost or destroyed; that this petition was made to the intendente in accordance with the royal instructions of the 15th day of October, 1754, and article 81 of royal ordinances and instructions in relation to the intendentes of the 4th day of December, 1786.

2nd. That, in accordance with said petition, the lands petitioned for were ordered by the intendente to be surveyed by the proper officer, and, on the 14th day of January, 1807, the said lands were surveyed and the boundary monuments established by Don Manuel de Leon, commandante of the presidio of Tubac.

3rd. That on the second day of April, 1807, the said Don Alejo Garcia Conde, intendente, &c., issued a royal patent or title, under the laws referred to, to the Indians of the pueblo of Tumacacori for

the lands, as clearly and fully described in the proceedings in relation to the survey thereof, which proceedings are set out at length in the copy of the original expediente, marked Exhibit A, and which original title or patent was duly registered in Book No. 174, existing in the "juzgado privativo."

4th. That under the law of the Mexican congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned pueblos, Don Francisco Aguilar, on the 18th day of April, 1844, became the owner, by purchase for the sum of $500,

82 of the four square leagues of agricultural and grazing lands of the "fundo legal" of the abandoned pueblo of Tumacacori and the sitios of the estancia (stock farm) of Calabasas and the other places thereunto pertaining, the areas, boundaries, monuments, and colindantes of which are set forth in the corresponding proceedings of measurement made in the year 1807 by the commissioner and surveyor, Don Manuel de Leon; that the original proceedings of denouncement and sale to the said Aguilar are set out at length in the original expediente hereinbefore referred to, a copy of which is marked Exhibit "B," a registry of the sale and denouncement being made in the corresponding book.

5th. That on the 2nd day of March, 1869, Don Francisco A. Aguilar, by deed of conveyance duly executed in the city of Guaymas de Zoragoza, sold the lands purchased by him under denouncement as aforesaid to Don Manuel Ma. Gandara, which deed of conveyance is fully set out in the original expediente referred to and registered on folios 2 and 3 of the respective book.

6th. That on the 24th day of July, 1877, the said Don Manuel Ma. Gandara, of the State of Sonora, Republic of Mexico, sold and conveyed the premises hereinbefore described to your petitioners, John Curry and Charles P. Sykes, who are citizens of the State of California, as is shown by deed of conveyance executed to them by Don Manuel Ma. Gandara, bearing date July 24th, 1877, which deed is hereto annexed, marked Exhibit "C."

83 And your petitioners further aver that the ancient grant of the rancho of Tumacacori and Las Calabasas is referred to and called for in the records of the coterminous grants, and also that it is referred to in the book of "Toma de Rozon" of grants now existing in and forms a part of the ancient archives of the Mexican State of Sonora and of the ancient intendencia of the Spanish province of the same name; and, further, that the *bona fides* of said title papers can be established, if required, by the testimony of expert witnesses who are familiar with the laws, usages, and customs of Mexico in relation to the granting of lands, and also acquainted with the handwritings of the Spanish and Mexican officials of that country during the time covered by these title papers.

Your petitioners further allege that the premises referred to were in actual and useful possession and occupation by the original grantees for many years, and so continued until when, from inevitable causes, they became deserted, and under the laws denounceable. Whereupon the lands now claimed by your petitioners were denounced and purchased by Don Francisco A. Aguilar, and that they

have been owned and possessed by the said Aguilar and his successors from the date of said denouncement down to the present time, and that the possession thereof during this time has been continuous, save when unavoidably interrupted by the hostility of the neighboring savages, and that your petitioners, under their
84 purchase aforesaid, are now in possession and useful occupation of said lands, having expended large sums of money in the development and improvement thereof. In view of the foregoing, your petitioners claim that their title to the lands as described is absolute and indefeasible under the laws of Spain and Mexico; that it would be so held and regarded by the laws of all civilized nations, and that it is guaranteed by the treaty stipulations between the Governments of the United States and Mexico bearing date Dec. 30th, 1853. They therefore claim a confirmation by the proper tribunals of the Government of the United States of the title to all the lands as described in the original title papers, to which reference is made for a particular description of location and boundaries, asking that the whole of said original title papers be considered as a part of this their petition; and they will ever pray.

JOHN CURRY.
C. P. SYKES.

San Francisco, Cal., December 15, 1879.

(Endorsed:) "Filed Dec. 22nd, 1879. John Wasson, U. S. surveyor general."

XX.

It is stipulated that Prince's Law of New Mexico contains true copies of the laws of the Territory of New Mexico.

It is also stipulated and agreed that the instructions to the surveyor general of Arizona, dated Department of the Interior, General Land Office, Washington, January 9th, 1877, might be re-
85 ferred to in any future argument or proceeding in this case as if the same were copied in full in the record.

XXI.

Opinion and Recommendations of Surveyor General.

U. S. SURVEYOR GENERAL'S OFFICE,
TUCSON, A. T., *Jan'y 7th*, 1880.

Opinion and recommendation by the surveyor general.

The history of this claim, as shown by the original title papers, is as follows:

(Here follows history of claim.)

Omitted by consent.

* * * * * * *

"In consideration of the foregoing historic facts in relation to this

claim and of the laws, usages, customs, and testimony in relation thereto, I find—

1. That the *bona fide* character of the claim is established beyond a doubt; that although the "matrix" of the original expediente cannot now be found in the Mexican archives of Sonora, yet that it once existed there in its proper place cannot be reasonably questioned. It is shown by the affidavit of R. C. Hopkins filed in the case that the handwriting, paper, &c., of the title to the Indians of the pueblo of Tumacacori of 1807 correspond in character with the handwriting and paper of that date, as found in the government archives of the ancient Province of Sonora. This affiant also states that he is familiar with the signatures of Alejo Garcia Conde,
86 Ignacio Lopez, and Jose Maria Mendoza, the granting officers, and that their signatures to the original title papers, as filed, are unquestionably genuine. The genuine character of the title papers is further established or supported and the location of the tracts granted fixed by the official records of the coterminous grants, as well as by the contemporaneous history and tradition.

The report made by Special Agent R. C. Hopkins in relation to the records in Mexico of Spanish grants in the Territory of Arizona shows that this grant is called for as a boundary in the grants of "Buena Vista," "San Jose de Sonoyta," and in the grant of the "Sobrante" lands lying between the ranchos of "La Casita" and Calabasas (Tumacacori). A record of these several grants is found in the Mexican or government archives in Sonora.

2. That under the laws of Spain in relation to the establishment of pueblos the pueblo of Tumacacori was entitled to four square leagues as a "fundo legal," or pueblo territory, but that a much less quantity than four square leagues was included within the measurements actually made, as shown by the field-notes of the survey made in 1807; that the said measurements of the estancia, or stock farm, embrace a much less quantity than the two sitios called for in the title papers, and the addition thereto subsequently asked for by the Indians and granted to them was limited by boundaries, and hence the quantity cannot be known without an actual survey.
87 3. That the premises in question were in useful occupation by Governor Manuel Maria Gandara at the time when the dominion of the country was ceded by the Government of Mexico to that of the United States, and that he remained in possession thereof for several years thereafter and probably until he was forced to abandon them.

4. That portions of the granted lands, according to the testimony in this case and the general understanding, contain minerals.

5. That the deraignment of title from the purchaser, Francisco A. Aguilar, who, in 1844, denounced the land, down to the present claimants appears to be perfect.

I therefore recommend a confirmation to the claimants, C. P. Sykes and John Curry, of the lands belonging to the ancient Indian pueblo of Tumacacori (as a "fundo legal"), embracing four square leagues; and also of the stock farm or "estancia" belonging to said pueblo, which embraces the ancient places of Guevavi and Las Cala-

basas, and which is to be located in accordance with the boundaries called for in the original title papers filed in the case.

JOHN WASSON,
U. S. Surveyor General.

United States surveyor general's office, Tucson, Arizona, January 7th, 1880.

It was admitted that no final action had been taken by Congress upon said recommendation.

88 XXII.

That the defendants entered into possession of a part of the premises in controversy at the date of their deed aforesaid, to wit, September 21st, 1881, and in the latter part of December, 1882, or early in January, 1883, they placed a large number of cattle upon said lands, and have ever since used the same for pasturage of said cattle, and that the said property has been assessed to them in each year since 1882, including that year, and the taxes paid by them.

XXIII.

That the defendants, The New Mexico & Arizona R. R., are in possession of that portion of their road-bed which crosses the premises in controversy, claiming the same under proceedings begun by them October 3rd, 1882, against the Santa Rita Land and Mining Company to condemn the same, in which said proceeding the lands claimed by said railroad company were condemned on the — day of ——, 188–, and the railroad company afterwards and on March 5th, 1884, paid to the Santa Rita Land and Mining Co. the amount at which in said proceedings the lands condemned were appraised.

XXIV.

That Santiago Ainsa is a resident of Tucson and a member of the bar of Pima county.

89 And that he has resided at Tucson, in the Territory of Arizona, for the past eleven years; is a native of Sonora, Mexico; knew the land in controversy many years; knew of the grant for 30 to 40 years; first knew that Gandara claimed the grant about eleven years ago; knew eleven years ago that the grant had been sold to Sykes and others; knew the condition of the record as it appears in the recorder's office at Tucson 11 years ago; did not tell the plaintiffs in this case of the supposed defects in defendants' title, but told them he thought they had an interest in Arizona and they wanted him to move in the matter; told them shortly before they executed the deeds to him; was acting in the matter simply for himself. When the heirs of Aguilar executed the deeds to him they did not know what they were conveying. He told them they had an interest in Arizona, and they gave him one-half interest if he would bring suit for them and himself; told them three or four months afterwards what the interest was; had known that the grant was

claimed by the defendants soon after he came to Tucson and has known it ever since; knew Mr. Williams, their agent; did not know Mr. Towne, their present agent; knew that the defendant had large improvement in the way of building upon the grant, and by reputation that they had a large number of cattle pasturing thereon; knew this when he went to Mexico to get these deeds; had never had notice of the instrument of 1856 until a few days ago; knew that the original claim had been filed with the surveyor general, but never had examined it; had never examined the papers in the surveyor general's office and did not know that Manuel Gandara had made application to surveyor general's office.

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XXV.

Power of Attorney. Gandara to Gandara.

General power of attorney conferred by Mr. Manuel Ma. Gandara, pertaining under the jurisdiction of Ures, capital of the State of Sonora, and residing in that city, upon his sons, Messrs. Francisco and Miguel Gandara, of the same place, San Luis Potosi, in the year 1869.

In the city of San Luis Potosi, on the twenty-eighth day of January, one thousand eight hundred and sixty-eight, before me, the notary, and hereafter-mentioned witnesses, appeared Mr. Manuel Maria Gandara, pertaining under the jurisdiction of the city of Ures, capital of the State of Sonora, and residing in that city, being a person of age (legally), whom I certify to know personally, and declared that he appoints his sons, Francisco and Miguel Gandara, of the same place, jointly and severally, his special and general attorneys; that they may attend to all business intrusted to them by letter or special instructions which he may communicate to them whenever necessary, so that they shall be considered as having full power, and that he especially authorizes them to procure the transfer of the title deeds referring to the lands of Tumacacori, Calabasas, and Huevavi, which are situated in the Territory of Arizona, pertaining to the United States of America, and that they may proceed to the sale thereof according to the terms which his respective instructions may designate, and that if, in order to attend to said business which he may require them to do, it shall become necessary for them to invoke the law (judicial proceedings), either voluntarily or by compulsion, I give them power to, in the first case, take such legal steps as may be necessary to attain their object, for which they may legally sue; and, in the second case, that they may bring suits and contest suits if brought against them, after having tried conciliatory means (arbitration), in applicable cases, taking in the preparation for and in the course and progress of said suits all steps and measures that may be required in the order of the proceedings, or may refer to the use and exercise of rights and special appeals, whereby they may transfer a cause to another tribunal on account of incompetency of the judges, or that they may prorogue a cause to raise exceptions, to examine into the truth of

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stated facts by means of legally obtained testimony, to challenge and contradict the opposing testimony and argument, to question and make answers in interrogatories, to introduce clauses, to appoint experts wherever the services of such shall be needed, and to make every defense by law allowed, to exact securities, demand
92 interventions, suspensions (postponements), sale and auction of property attached by process of law from persons that be in any manner indebted to them, to ask for seizures and ejectments, the former referring not only to usual transactions, but also everything that relates to the violation of individual stipulations (guarantees) made by the Federal authorities; to appeal, petition, annul and exact responsible securities in the respective cases, to take all these steps and to refuse them or resist until the termination, to substitute another for the present power of attorney in such cases where the attorneys (empowered parties) shall deem it necessary, to revoke their appointments and make new ones, to bring before or submit their differences to the decision of arbitrators, to do all these things according to the instructions that he may give them, and, in fact, to do and act in all litigations the same as if the exponent (grantor) would do and act if he were himself present, and, as to specified business that he may intrust to them, to do all that may be necessary to obtain the desired object, holding themselves strictly to his instructions, and, as it is possible that transactions may occur at different places at the same time, in order that his appointed agents may act with legal authority in every special case, they shall make of this power of attorney a corresponding copy, to be used as credentials by him that may need it, which copy shall be con-
93 sidered as having the same legal force as the original power, which will remain in the hands of the one who keeps it as security for the acts of his agents (attorneys). The exponent (grantor) holds himself responsible with his property, present and future, according to law, and I place my signature here in the presence of the witnesses, "Guillermo Dias de Leon" and "Marcos Medina," of this place.

I sign, Manuel Maria Gandara; Ysidro Calvillo, national notary public. Taken from the record for the attorneys (grantees) on the day of making the document on this sheet, with the stamp of second-class, according to law. I sign,

YSIDRO CALVILLO.

We, the undersigned, notaries, certify and attest that the mark (notarial signet) and signature upon the foregoing document are those of citizen Ysidro Calvillo, a notary, which title and office he bears and executes in this capital, they being entitled to full faith and credit, according to law, in all acts which he as notary attests (legalizes).

In witness whereof we place hereunto our signatures and signets, at San Luis Potosi, on the date above given.

ANACLETO RODRIG'Z,
Notary Public.
ABRAHAM DE LAS RYES,
National Notary Public.

DOMINGO DE ARRIOLA, *E. P. N.*

Citizen Carlos Tovar, constitutional substitutional governor of the State of San Luis Potosi, in the Mexican Republic.

94 I certify that the three notaries' signets and signatures which precede and [are] respectively those of the citizen Domingo de Arriola, Anacleto Rodriguez, and Abraham de los Reys, who bear the titles of national notaries public, and that everything which as such they attest is entitled to full faith and credit in court and out of it.

In witness whereof I sign these presents, at San Luis Potosi, on the twenty-ninth day of January, one thousand eight hundred and sixty-nine.

[SEAL] CARLOS TOVAR.
B. GOMES DE LA CASA.

Domingo Rubi, general of brigade and constitutional governor of the State of Sinaloa.

I certify that according to the records existing in the archives of the state department of this government the signature which precedes is that of citizen Carlos Tovar, constitutional substitutional governor of the State of San Luis Potosi, and is therefore entitled to full faith and credit. Mazatlan, the twenty-second day of February, one thousand eight hundred and sixty-nine.

DOMINGO RUBI,
[SEAL.] T. MARTINEZ, *Secretary.*

CONSULATE OF THE UNITED STATES,
MAZATLAN, *Feb'y 24th*, 1869.

I, the undersigned, consul agent of the U. S. A. for the port of Mazatlan and the dependencies thereof, do hereby certify that I

95 am personally acquainted with Domingo Rubi, governor of this State of Sinaloa; that the foregoing is his true and genuine signature, and as such is entitled to full faith and credit.

[CONSULATE SEAL.] Given under my hand and the seal of this consulate the day and year above mentioned.

GARIC SISSON,
U. S. Cons'l Agent.

Filed July 23rd, 1869, at ten o'clock a. m., and recorded on same day, at 3 o'clock p. m.

OSCAR BUCKALEW, *Recorder.*

It is stipulated that the foregoing is a true statement of the facts in this action.

JEFFORDS & FRANKLIN,
Attorneys for Plaintiffs.
HAYNES & MITCHELL,
Attorneys for Defendants.

96 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs,
vs.
THE SANTA RITA LAND AND MINING COMPANY *et al.*, Defendants.
} Action to Quiet Title. Bill of Exceptions No. 1.

Be it remembered that this cause came on regularly for trial on the second day of February, A. D. 1888, in the above-entitled court, before the court sitting without a jury, a trial by jury having been expressly waived in writing by the respective parties, and thereupon came the plaintiffs, by their attorneys, Messrs. Jeffords & Franklin, and came also the defendants, The Santa Rita Land and Mining Company and The New Mexico and Arizona Railroad Company, by their attorneys, Messrs. Haynes & Mitchell. The court proceeded to the trial of the said cause; whereupon, among other things during said trial, the said defendants offered in evidence, in order to show title in itself, the following document, to wit:

A certified copy of the expediente and title papers of the grant of the Rancho Tumacacori, Calabasas, and Huevavi, made by the
97 State of Sonora to Francisco A. Aguilar; which said copy was made in 1856, and upon which were the following endorsements:

"PORT OF GUAYMAS, *March 31st*, 1856.

Before me, Pedro de Valois, judge of the 2nd inst. of the district, appeared to-day Mr. D. Francisco A. Aguilar, of this city, exhibiting the present title, consisting of 39 written sheets, which proves his rights, acquired legally and legitimately, to the lands, and which therein are expressed, which he has made over to Mr. Manuel Maria Gandara, with the same rights and concessions that he himself had received from the general treasury of the state, that he may have power, as absolute owner and proprietor thereof, to dispose of them as might best suit his convenience or interests. Thus I certify that he executed the document and signed it in my presence and that of the witnesses.

P. DE VALOIS.
F. A. AGUILAR.

Witnesses:
QUIRINO ROSAS.
LORENZO POMPA.
JESUS GONZALES MENESES,
National and Public Secretary (Notary),
Resident of this City.

I certify with all the power of law that the signature with which is provided the foregoing deed of transfer, and which is "P. de Valois," is the signature of the said judge who at the time was judge of the 1st instance of Guaymas, as he states, and that it the same signature which he habitually uses in all his business, public and private, and that as such it is to be considered of good faith and credit in judicial business and otherwise.

In witness whereof I thus certify and sign this certificate,
98 in the city of Hermosillo, State of Sonora, in the Republic of Mexico, on the tenth day of October, one thousand eight hundred and sixty-one.

[RUBRICA.] JESUS MENESES,
E. N'l y P. (National & Public Notary.")

Plaintiffs admitted the correctness of the translation of said endorsements (the originals of which were in the Spanish language); that the said endorsements were signed at the places and times and by the persons when, where, and by whom they purport to be signed, but objected to the introduction of the same on the following grounds:

1st. That said writings are irrelevant, incompetent, and immaterial.

2nd. That said writings do not purport to be an instrument in writing executed by Francisco A. Aguilar, but does [do] purport to be merely the certificates of a judge of a court without a seal.

3rd. That said writings are not a conveyance of real property for the reasons—

First. That they are merely the certificates of a judge without a seal—an unauthorized office.

Second. That they are not acknowledged by Francisco A. Aguilar or any legal agent or attorney of his.

Third. That they contain no words of grant or sale.

Fourth. That they contain no price or consideration, and none was showed [shown] or avowed.

Fifth. That they are not under seal.

99 Sixth. That they contain no description of any real property.

4th. That said writings upon their face do not purport to be a deed, conveyance, or gift, but do purport to be a power of attorney from Francisco A. Aguilar to Manuel M. Gandara, and there is no evidence or avowal that any deed or conveyance was ever made or attempted to be made thereunder.

5th. That said writings are not valid as a power of attorney for the reason that the same are not acknowledged by Francisco A. Aguilar, as required by the law when the same was made.

6th. That said written instruments are not good as a contract to sell or convey real property for the reasons stated in the foregoing objections.

7th. That it is not shown that writings were ever delivered by Francisco A. Aguilar, or by any agent or attorney of his or by any person for him, unto Manuel M. Gandara or any person whatsoever.

8th. That said writings, being incompetent for any purpose whatsoever, should be excluded as evidence.

The court overruled the objection of plaintiffs and admitted said writings in evidence; to which ruling of the court the plaintiffs then and there instantly excepted upon the grounds and for the reasons stated in their objections.

100 *Bill of Exception.*

Part No. II.

That the defendants then offered in evidence a document purporting to be a petition by Manuel Gandara in the matter of his claim to the lands of Tumacacori, Calabasas, and Huevavi; which said document was signed as follows:

"MANUEL GANDARA,
"By his attorney, W. CLAUDE JONES."

Which said document is fully set forth in the statement of facts in this case, reference to which is hereby made.

Said instrument was produced by the surveyor general of Arizona Territory from the files in his office. Said instrument was indorsed as follows:

"Filed June 9th, 1864. Levi Bashford, surveyor general."

Plaintiffs objected to the admission in evidence of said document on the grounds following:

1st. That the same is irrelevant, incompetent, and immaterial.

2d. That there is no evidence showing or tending to show that W. Claude Jones was the attorney for Manuel Gandara.

3rd. That there is no evidence showing or tending to show that the statements in said documents set forth were ever made by Manuel Gandara or by any one for him with his knowledge.

4th. That said document and petition are not verified by the oath of Manuel Gandara or of W. Claude Jones or any other person or persons whatsoever, and is not competent evidence of any fact, statement, or allegation set forth therein.

101 5th. That there is no law authorizing, permitting, or requiring the filing of such a document with the surveyor general of Arizona, and the same is irrelevant, incompetent, and immaterial for any purpose.

The court overruled the said objections of plaintiffs and admitted said writings in evidence; to which ruling of the court the plaintiffs then and there instantly excepted upon the grounds and for the reasons stated in their objections.

Bill of Exception.

Part No. III.

The defendants then offered in evidence the report of the surveyor general of the Territory of Arizona reporting the grant of Tumacacori, Calabasas, and Huevavi to be valid and recommending the same for confirmation to C. P. Sykes and John Curry, said report being dated January 7th, 1880, and which said report is fully set forth in the statement of facts herein on pages 94 to 97, reference to which is hereby made.

Plaintiffs objected to so much of said report as recommended that

said grant be confirmed to C. P. Sykes and John Curry on the following grounds:

1. That the same was irrelevant, incompetent, and immaterial.

2nd. That said surveyor general was without jurisdiction to make any report or decision which could in any way affect the plaintiffs' rights to the lands in controversy, for the reason that said
102 grant was a perfect grant, vesting a complete and perfect title in Francisco A. Aguilar before the treaty of cession of 1854.

3rd. That Francisco A. Aguilar had not nor had any of these plaintiffs submitted their claims or title to said surveyor general for his decision or report thereon or otherwise, and that the title and rights of these plaintiffs were never investigated or passed upon by said surveyor general.

4th. That said surveyor general had no authority, power, or jurisdiction to investigate, pass upon, report, or determine the rights of these plaintiffs, or persons under whom they claim, in and to the said premises in dispute.

The court overruled the said objection of plaintiffs and admitted that portion of said report so objected to; to which ruling of the court plaintiffs then and there instantly excepted, upon the grounds and for the reasons stated in their objection.

Whereupon the plaintiffs tendered this their bill of exceptions in open court, praying that the same be allowed and signed by the judge and made a part of the record in this cause.

All of which is accordingly done this 6th day of February, 1888.

WM. H. BARNES,
Judge of the said First Judicial District Court of Pima County, Arizona Territory.

(Endorsed:) Filed Feb. 6th, 1888. J. H. Martin, clerk.

103 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs,
vs.
THE SANTA RITA LAND AND MINING COMPANY (a Corporation) *et al.*, Defendants.

Action to Quiet Title. Bill of Exceptions No. 4.

Be it remembered that this cause came on regularly to be heard in the above-entitled court on the sixth day of February, A. D. 1888, upon the motion of plaintiffs to set aside and vacate the judgment in this action and to grant a new trial of said action; and thereupon came the respective parties by their attorneys. Said motion was in the words and figures following, to wit:

"Now come the plaintiffs in the above-entitled action and move the court to vacate the judgment and grant a new trial of this action for the following reasons:

1st. Because the judgment and decision are contrary to the evidence.

2nd. Because the judgment and decision are contrary to the law.

3rd. Because the court erred in admitting improper evi-
104 dence at the trial against plaintiffs' objection.

4th. Because the court erred in dismissing plaintiffs' complaint in this action."

The court, after hearing the argument of counsel and being fully advised in the premises, did deny and overrule said motion; to which ruling of the court the plaintiffs then and there instantly excepted and tendered this their bill of exceptions, praying that the same be signed and allowed by the judge and made a part of the record in this cause; all of which is accordingly done and signed this sixth day of February, A. D. 1888.

WM. H. BARNES,
Judge of the said First Judicial District Court of Pima County, Arizona Territory.

(Endorsed:) Filed Feb. 6th, 1888. J. H. Martin, clerk.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

DOLORES G. ASTIAZRAN *et al.*, Plaintiffs,
vs.
THE SANTA RITA LAND AND MINING COMPANY (a Corporation) *et al.*, Defendants.

Assignment of Errors.

I.

That the judgment and decree of the district court is
105 contrary to evidence in this, that it appeared from the evidence that the defendants had no estate, title, or interest in the lands described in the complaint, and that the plaintiffs were the owners in fee thereof.

II.

The court erred in admitting in evidence the purported conveyance of 1856 from Francisco A. Aguilar to Manuel Gandara.

III.

The court erred in admitting in evidence the purported petition of Manuel M. Gandara to the U. S. surveyor general for the Territory of Arizona for the confirmation of the grant therein described.

IV.

The court erred in admitting in evidence the report of said surveyor general recommending the confirmation of said grant to C. P. Sykes and John Curry.

V.

The court erred in dismissing the complaint in this action and in not rendering its judgment and decree in favor of the plaintiffs and against the defendants, as prayed for in said complaint.

VI.

That the judgment and decree of the district court is against the law; and—

VII.

The court erred in denying plaintiffs' motion for a new trial.

JEFFORDS & FRANKLIN, *Att'ys for Pl'tffs.*

(Endorsed:) Filed Feb. 17th, 1888. J. H. Martin, clerk.

106 *Cost Bond on Appeal.*

Title of court and cause.

Whereas, in the above-entitled cause pending in the district court of the first judicial district of the Territory of Arizona in and for the county of Pima, and at a regular term of said court, to wit, on the 6th day of February, 1888, the defendants in the above-entitled action recovered judgment against the plaintiffs therein, dismissing their complaint, and for the sum of six and $\frac{25}{100}$ dollars costs of suit, from which judgment the said plaintiffs have taken an appeal to our supreme court: Now, therefore, we, Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Miguel Gandara, Jose Maria Gandara, Carmen Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, as principals, and B. M. Jacobs and Albert Steinfeld, sureties, acknowledge ourselves bound to pay to the Santa Rita Land and Mining Company (a corporation) and the New Mexico and Arizona Railroad Co. (a corporation) the sum of one hundred and fifty dollars, conditioned that the said principals, as appellants in said action, shall prosecute their said appeal with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court.

107 Witness our hands this 17th day of February, 1888.

B. M. Jacobs.		[SEAL.]
Albert Steinfeld.		[SEAL.]
Dolores G. Astiazaran,	by Jeffords & Franklin, att'ys.	[SEAL.]
Jesus A. de Oceguera,	by Jeffords & Franklin, "	[SEAL.]
Francisco Oceguera,	by Jeffords & Franklin, "	[SEAL.]
Carmen O. de Espriu,	by Jeffords & Franklin, "	[SEAL.]
Augustina O. de Robinson,	by Jeffords & Franklin, "	[SEAL.]
Francisco Gandara,	by Jeffords & Franklin, "	[SEAL.]
Miguel Gandara,	by Jeffords & Franklin, "	[SEAL.]
Jose Maria Gandara,	by Jeffords & Franklin, "	[SEAL.]
Carmen Gandara,	by Jeffords & Franklin, "	[SEAL.]
Ana Gandara,	by Jeffords & Franklin, "	[SEAL.]
Trinidad Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Ferdinand Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Anita Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Jesus Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Carmen Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Victor Aguilar,	by Jeffords & Franklin, "	[SEAL.]
Frank Ely,	by Jeffords & Franklin, "	[SEAL.]

108 I have fixed the probable amount of costs of the suit of both the appellate court and the court below at seventy-five dollars and approve the foregoing bond this 17th day of February, 1888.

J. H. MARTIN, *Clerk.*

Indorsed: Filed Feb. 17th, 1888. J. H. Martin, clerk.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

I, J. H. Martin, clerk of the district court of the first judicial district of the Territory of Arizona in and for the county of Pima, do hereby certify the foregoing to be a full, true, and correct transcript of the proceedings had in the cause entitled Dolores G. Astiazaran *et als. vs.* The Santa Rita Land and Mining Company *et al.*, as provided for in sections two hundred and twenty-four, five, and six of chap. 20, Revised Statutes, Territory of Arizona.

[SEAL.] In witness whereof I have hereunto set my hand and the seal of said court this 18th day of February, A. D. 1888.

J. H. MARTIN, *Clerk.*

Transcript demanded by Jeffords & Franklin Feb. 13th, 1888.
Transcript delivered to Jeffords & Franklin Feb. 18th, 1888.

109 *Opinion.*

In the Supreme Court of the Territory of Arizona. Adjourned Term, at Tucson, March, 1888.

DOLORES G. ASTIAZARAN *et al.*, Appellants,
vs.
THE SANTA RITA LAND AND MINING COMPANY *et al.*, Appellees.

Appeal from first judicial district; Barnes, judge.

Mess. Jeffords & Franklin, att'ys for appellants; Mess. Haynes & Mitchell, att'ys for appellees.

Appellants brought this suit in equity for the purpose of quieting title. In their complaint appellants claim title to about 52,000 acres of land derived from a grant made by the Mexican Government on the 19th of April, 1844, to one Francisco Alexandro Aguilar. At the trial below the court dismissed the complaint and rendered judgment for costs against appellants. Motion for new trial was duly entered and, upon the overruling thereof, the case has been brought here by appeal.

We are of the opinion that the judgment of the court below should be affirmed for two reasons: 1st, because the court had no
110 jurisdiction; and, 2nd, if it did the complaint did not state facts sufficient to constitute a cause of action in equity and justified no relief in equity.

In this case it is difficult for us to reconcile a reasonable construction of the act of Congress of July the 15th, 1870, or the act of

July 22nd, 1854, of which it was supplemental, with the contention of appellants' learned counsel for the court's jurisdiction. Beyond question the various acts of Congress creating particular tribunals, with power in the first instance to carry into effect the provisions of the treaty of Guadalupe Hidalgo and the Gadsden purchase relating thereto, conferred upon those particular tribunals, within their respective territorial jurisdictions, exclusive power to determine primarily all questions touching land grants under the laws of Spain and Mexico.

This whole subject originally belongs to the political branch of the Government, over it Congress has absolute dominion, and no court or tribunal had any jurisdiction over matters pertaining thereto, except such as Congress has by act designated, and then only to the extent to which it has conferred jurisdiction.

As instances, Congress by its act of 1851 conferred upon the commissioners power and jurisdiction to settle primarily all questions pertaining to land grants under Spanish or Mexican laws in California, and by the act of 1854 it conferred like power and
111 jurisdiction upon the surveyor general of New Mexico, and by the supplemental act of July the 15th, 1870, similar power and jurisdiction were extended to and conferred upon the surveyor general of Arizona. Under the Constitution Congress alone can dispose absolutely of the public domain; therefore — the *modus operandi* of its disposition we must look to Federal legislation. If there has been an expression of the legislative intent it is the duty of the court, as a subordinate branch of the judicial department of the Government, to carry out the legislative will. Now, Congress has given power to no tribunal, has conferred jurisdiction upon no forum primarily to pass upon and determine questions affecting the validity or invalidity of Spanish or Mexican land grants in this territory, except the surveyor general. By the acts above referred to he has given power and it is made his duty to determine in the first instance the validity, origin, nature, character, and extent of all these grants. This is a vast primary power; but, however much as we may question the wisdom and practical utility of the laws conferring upon this officer such power and jurisdiction, still the stubborn fact remains that courts have nothing to do with legislation.

Perhaps the speediest and surest way to secure the enactment of a good law is the vigorous enforcement of an objectionable one. These views are so simple and familiar that it almost seems a tautological task to express them. They are but the expression of the common mind. It is unnecessary to say we
112 make no intimation that the finding and decision of the surveyor general are final or conclusive. They are not, but their effect is to hold in abeyance the title to the lands covered by the grant and to withdraw them from sale or other disposition by the Government until the final action of Congress. There might be questions not involving title—such as forcible entry and unlawful detainer, mere questions of the right of possession—which the courts might exercise jurisdiction to determine; and whilst it may

be that in Chaves *vs.* Whitney the supreme court of New Mexico, Pacific Rep., vol. 16, No. 8, went a little too far, still there might be cases in which the territorial courts might exercise a limited jurisdiction in order to preserve the *status in quo*.

No such question, however, is presented by the record here. It is to be observed that this case seemingly overrules Whitney *vs.* McAfee, supreme court of New Mexico, 1st West Coast Rep., 162. The syllabus seems also to be sustained by the decision, but we hardly believe the court meant that the action of the surveyor general has no legal effect whatever.

Is it not true that the courts are bound by the reports of these officers until the final action thereon by Congress?

Until then can the courts adjudicate upon the titles to the lands affected by those reports? Tameling *vs.* Emigration Co., 93 U. S.,
661, does not, we think, fully support the position that the
113 decision and report of the surveyor general are not binding upon the courts of New Mexico until confirmed by Congress. Can it be that until Congress confirms these reports they have no legal effect whatever? What tribunal is clothed with absolute authority to determine in the first instance, not only the validity, but the origin, nature, character, and extent of land claims of Spanish or Mexican origin in New Mexico, if not the office of the surveyor general? Certainly, if he has this power, his acts are of some legal effect, and the courts there as well as elsewhere are bound by them.

But the appellants, by their learned counsel, insist that, as the grant of the lands in question by the Mexican Government to the elder Aguilar, in 1844, was a perfect grant, and as there have been since the Gadsden purchase sundry mesne conveyances of the lands included in the grant by the said Aguilar or those claiming under him, the court had jurisdiction to pass upon these various conveyances and to adjudicate upon the rights of the parties thereunder, notwithstanding the surveyor general of this Territory had ascertained the origin, nature, character, and extent of said grant and had rendered his decision thereon, had reported to Congress, and there had been no final action by Congress upon that report. We do not think this position tenable. Suppose the court had assumed jurisdiction, had adjudicated upon the rights of the parties, had
passed upon and judicially construed these various convey-
114 ances, and decided that one party or the other owned the lands in fee. Then suppose Congress had passed an act, not confirming the report of the surveyor general, but declaring said grant to the elder Aguilar invalid, what would the decision of the court have been worth? Again, suppose the court had decreed title to these lands in one party and the action of Congress confirms the title to the other party, can it be for a moment doubted that the action of the court would be worse than a nullity? Would not the other party own the lands in the face of the court's decree?

It seems to us indisputable that until Congress acts upon the decision and report of the surveyor general the courts cannot pass upon any questions involving the title to lands of Spanish or Mexican origin prior to the Gadsden purchase, and to pass upon ques-

tions as to the nature, character, legibility, etc., of these conveyances would necessarily be to pass upon questions involving the validity or invalidity of a Mexican land grant. By the sixth article of the Gadsden treaty the United States expressly refused to be obligated or bound by any Spanish or Mexican grant "that had not been located and duly recorded in the Mexican archives; so that it is titles under valid grants only that Congress will confirm.

And unless attacked directly for fraud or mistake the courts will not review the action of land officers.

When the questions cease to be matters of congressional cognizance and are relegated to the domain of private rights,
115 then the jurisdiction of the courts would attach, not to the extent, however, of exercising power or jurisdiction to review or modify congressional action on the decision and report of the surveyor general. We do not believe the action of this officer is subject to collateral attack, it being a principle of law well recognized that where a special tribunal is authorized to hear and determine certain matters arising in the course of its duties its action when confined to the scope of its authority is conclusive unless changed or modified by paramount authority. But it is claimed by appellants that the surveyor general exceeded his authority in making his report. If so, should not his claim be established before the Congress of the United States, and thus prevent congressional action confirming that report? If he exceeded his authority would that justify the courts' interference? But we cannot see that the surveyor general in this case exceeded his statutory authority. Should the court have passed upon these mesne conveyances, and thus determined who had properly derived title under the original grant from the elder Aguilar? Could the court determine whether any title descended or had been acquired from him without first determining whether he himself had any title? Would it not thus be incumbent upon the court to determine the validity of the original grant? Can the stream rise above its original source; or, rather, will not the source largely determine the character of the
116 waters? And will not the original source of the title in a great measure characterize all deraignments under it? Hence we say the courts cannot act until Congress acts upon the surveyor general's report. Until then it is not subject to review in any forum. If this be so, the court below had no jurisdiction, and rightly dismissed the bill. See Johnson *vs.* Towsly, 12 Wall., 72; Tameling *vs.* Emigration Co., 93 U. S., 661; Maxwell Land Grant case, 121 U. S., 325; Whitney *vs.* McAfee, supreme court of New Mexico, 1st West Coast Rep., 162.

II We do not think the averments in the complaint were sufficient to constitute a cause of action, according to the well-established rules of pleading, or justified equitable relief. In the case of Ely *vs.* New Mexico & A. R. Co. *et al.*, 19th Pacific Rep., No. 1, page 6, this court held that whilst the Arizona statutes of 1881 contravened the old equity rule that a party must be in possession before he could maintain a peace bill or an action *quid timet*, still it was necessary for the plaintiff in his complaint to have brought himself under

some head of equitable remedy, and that where the complaint on its face revealed a clear and adequate remedy at law the plaintiff must resort to legal and not equitable tribunals. The complaint in that case was quite similar to the one at bar. In neither was it averred that plaintiff was in possession or was even entitled to possession, or that defendant's claim was a cloud upon their title, or any
117 other fact invoking equity cognizance. The supreme court of Texas has gone far towards abolishing the distinction between law and equity in this class of cases. The greater weight of authority, however, is still, we think, in favor of preserving the distinction, and the fundamental rule is still in vogue.

That rule, as laid down in Mr. Pomeroy's Equity Jurisprudence, is that, "in order that a case may come within the scope of the equity jurisdiction, one of two alternatives is essential—either the primary right, estate, or interest to be maintained or the violation of which furnishes the cause of action must be equitable rather than legal, or the remedy granted must be in its nature purely equitable; or, if it be a remedy which may be given by a court of law, it must be one which under the facts and circumstances of the case can only be made complete and adequate through the equitable modes of procedure."

For the reasons assigned in Ely *vs.* New Mexico and A. R. Co. *et al.*, we must hold that the complaint in this case does not state facts sufficient to constitute a cause of action in equity. See also Gage *vs.* Curtis *et al.*, 14 Northeastern Rep., vol. 14, No. 1, page 30, and Curry *et al. vs.* Peebles *et al.*, Southern Rep., vol. 3, No. 24, page 622.

Without deeming it necessary to consider other questions raised, the judgment of the district court is affirmed.

So ordered.

JAS. H. WRIGHT, *C. J.*

118 I concur with the decision, as I hold that Mexican grant is not legal title to sustain action of ejectment or bill to quiet title. Such grant must be confirmed by Congress first.

WM. H. BARNES, *A. J.*

Congress having provided a special tribunal for the adjudication of these claims, this court has no jurisdiction to determine titles to the lands.

I concur in the judgment.

WM. W. PORTER, *A. J.*

(Endorsed:) Filed January 19th, 1889, at 6 o'clock p. m.
WILLIAM WILKERSON, *Clerk.*

119 In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN *et al.*, Appellants,
vs.
THE SANTA RITA LAND AND MINING CO. (a Corporation) *et al.*, Appellees. } No. —

It is hereby ordered and adjudged that the facts found by the

district court in the above-entitled action are hereby adopted as the findings of fact of this court in the said action.

JAS. H. WRIGHT,
Chief Justice.

Done in open court Feb. 11th, 1889.

(Endorsed:) Filed Feb. 11th, 1889. Wm. Wilkerson, clerk, by J. E. Walker, deputy.

120 In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs and Appellants,
vs.
THE SANTA RITA LAND AND MINING COMPANY (a Corporation) *et al.*, Defendants and Appellees.

TERRITORY OF ARIZONA, *County of Pima,* } ss:

M. S. Snyder, being first duly sworn, says that he is the duly elected, qualified, and acting assessor of the county of Pima, Territory of Arizona; that he is personally acquainted with that certain piece or parcel of land known and called the Rancho Tumacacori, Calabasas, and Huebabi, situate in said Pima county, and being the property in dispute in this action; that the value of said property is more than the sum of five thousand dollars.

M. S. SNYDER.

Subscribed and sworn to before me, at Tucson, A. T., this 6th day of February, A. D. 1889.

[SEAL.]

BRYAN W. TICHENOR,
Notary Public, Pima Co., A. T.

121 TERRITORY OF ARIZONA, *County of Pima,* } ss:

Selim M. Franklin, being duly sworn, says that he is one of the attorneys for plaintiffs in the above-entitled action; that he is personally acquainted with that certain piece or parcel of land known and called the Rancho Tumacacori, Calabasas, and Huebabi, situate in the county of Pima and Territory of Arizona, and being the property in dispute in the above-entitled action; that his knowledge of the value of said land is based upon his personal knowledge thereof and the value of land in said county of Pima, Territory of Arizona; that the said property, being the property in dispute in this action, is and at the time of the final judgment by the court was worth more than the sum of five thousand dollars, exclusive of costs, and in affiant's judgment is and was worth not less than the sum of twenty thousand dollars.

SELIM M. FRANKLIN.

Subscribed and sworn to before me, at Tucson, A. T., this 6th day of February, A. D. 1889.

[SEAL.] BRYAN W. TICHENOR,
Notary Public, Pima Co., A. T.

Endorsed: Filed Feb. 11th, 1889. Wm. Wilkerson, clerk, by J. E. Walker, deputy.

122 In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs and Appellants,
vs.
THE SANTA RITA LAND AND MINING COMPANY (a Corporation) *et al.*, Defendants and Appellees.

To the honorable the Supreme Court of the United States:

The appeal of Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Miguel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, the above-named plaintiffs and appellants, respectively showeth that, on the twenty-fifth day of June, 1887, the above-named plaintiffs filed their bill in the district court of the first judicial district of the Territory of Arizona in and for the county of Pima against the above-named defendants and appellees, wherein said complainants sought to have each and all of said defendants forever enjoined and debarred from asserting any claim or title to that certain piece of land situate in the county of Pima, Territory of Arizona, and known as Rancho Tumaca-

123 cori, Calabasas and Huebabi, being the property of plaintiffs.

Thereafter said defendants filed their pleas and answers, and thereafter and on the second day of February, 1888, the said cause came on for trial before the court, and the same was tried by the court. During said trial defendant offered evidence, to which plaintiffs duly objected, and the objections being overruled, plaintiffs duly excepted, and the bill of exceptions thereof, duly signed, are of record in this cause.

That thereafter and on the — day of February, 1888, the court rendered its judgment and decree in said action dismissing plaintiffs' bill. That thereafter and on the sixth day of February, 1888, plaintiffs made their motion for a new trial; motion was denied by the court; to which ruling of the court plaintiffs duly excepted.

That thereafter and on the — day of ——, —, these plaintiffs appealed from the said judgment and decree and from the order overruling the motion for a new trial aforesaid and from the other orders and ruling in the said action to the supreme court of the Territory of Arizona.

That thereafter and on the — day of ——, 1889, the said supreme court of the Territory of Arizona made and pronounced a final decree in this cause, wherein the judgment and decree and the orders and rulings of said lower court were affirmed.

That the property in controversy in this action is of the
124 value of over five thousand dollars.

Wherefore these appellants appeal from the whole of said judgment and decree of the said supreme court of the Territory of Arizona, and respectfully pray that the judgment and decree of said supreme court and the bill, demurrer, pleadings, statement of facts, findings of fact, record, and proceedings in this action may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court may proceed to hear said cause anew, and that said decree and judgment of the supreme court of the Territory of Arizona may be reversed and a decree made adjudging that plaintiffs are the owners in fee of that certain property described in plaintiffs' bill, and that the said defendants and neither of them have any estate whatsoever therein, and that said defendants and both of them be forever enjoined from asserting any claim or interest thereto adverse to these complainants or any or either of them.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Attorneys for Plaintiffs and Appellants.

(Endorsed:) Filed Feb. 11th, 1889. Wm. Wilkerson, clerk, by J. E. Walker, deputy.

125 In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO OCEguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Plaintiffs,

vs.

THE SANTA RITA LAND AND MINING COMPANY (a Corporation) and The New Mexico and Arizona Railroad Company (a Corporation), Defendants.

Know all men by these presents that we, Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, as principals, and we, Lionel M. Jacobs, of Pima county, Arizona Territory, and —— ——, as sureties, are held and firmly bound unto the Santa Rita Land and Mining Company (a corporation) and the New Mexico and Arizona Railroad Company (a corporation) in the sum
126 of five hundred dollars, lawful money of the United States; which sum, well and truly to be paid, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this — day of February, A. D. 1889.

Now, the conditions of the above obligation is [are] such that whereas

the above-bounden Dolores G. Astiazran and the other principals mentioned herein and above fully set forth have taken an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the Territory of Arizona:

Now, therefore, if the above-named Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Miguel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely shall prosecute their said appeal to effect and answer all costs if they or any of them shall fail to make good their plea or the plea of any of them, then this obligation shall be void; otherwise to be and remain in full force and virtue.

Signed, sealed, and delivered in the presence of—

	DOLORES G. ASTIAZARAN.	[SEAL.]
	JESUS A. DE OCEGUERA.	[SEAL.]
	FRANCISCO O. OCEGUERA.	[SEAL.]
	CARMEN O. DE ESPRIU.	[SEAL.]
	AUGUSTINA O. DE ROBINSON.	[SEAL.]
127	FRANCISCO GANDARA.	[SEAL.]
	MIGEL GANDARA.	[SEAL.]
	ANA GANDARA.	[SEAL.]
	TRINIDAD AGUILLAR.	[SEAL.]
	FERNANDO AGUILAR.	[SEAL.]
	ANITA AGUILAR.	[SEAL.]
	JESUS AGUILAR.	[SEAL.]
	CARMEN AGUILAR.	[SEAL.]
	VICTOR AGUILAR.	[SEAL.]
	FRANK ELY.	[SEAL.]
	LIONEL M. JACOBS.	[SEAL.]
	ALBERT STEINFELD.	[SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Lionel M. Jacobs, being duly sworn, says that he is one of the persons named in and who executed the foregoing obligation; that he is a resident and freeholder of said county and Territory, and is worth at least the sum of one thousand dollars over and above all his just debts and liabilities and the exemptions allowed by law.

LIONEL M. JACOBS.

Subscribed and sworn to before me, at Tucson, Pima Co., A. T., this 2nd day of February, 1889.

BRYAN W. TICHENOR,
[SEAL.] *Notary Public, Pima Co., Ariz.*

128 TERRITORY OF ARIZONA, } ss:
County of Pima, }

Albert Steinfeld, being duly sworn, says that he is one of the persons named in and who executed the foregoing obligation; that he

is a resident and freeholder of said county and Territory, and is worth at least the sum of one thousand dollars over and above his just debts and liabilities and the exemptions allowed by law.

ALBERT STEINFELD.

Subscribed and sworn to before me, at Tucson, Pima Co., Arizona, this 9th day of February, 1889.

SELIM M. FRANKLIN,
[SEAL.] *Notary Public, Pima Co., Arizona.*

The foregoing bond approved this — day of February, A. D. 1889.

JAMES H. WRIGHT,
Chief Justice.

(Endorsed:) Filed Feb. 11th, 1889. Wm. Wilkerson, clerk, by J. E. Walker, deputy.

129 In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN *et al.*, Plaintiffs,
vs.
THE SANTA RITA LAND AND MINING COMPANY (a Corporation), Defendants.

Minute Order, January 11th, 1889.

Upon motion of Messrs. Jeffords & Franklin and Rochester Ford, attorneys for appellants in the above-entitled cause, and it appearing to the satisfaction of this court that the property in controversy in said action exceeds in value the sum of five thousand dollars, and the said plaintiffs and appellants having filed a cost bond, which has been duly approved by this court—

It is hereby ordered that the appeal of Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely from the judgment and decree of this court in the above-entitled cause to the Supreme Court of the United States be, and the same hereby is, granted and allowed in open court.

130 In the Supreme Court of the United States.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Plaintiffs,

vs.

THE SANTA RITA LAND AND MINING COMPANY (a Corporation) and The New Mexico and Arizona Railroad Company (a Corporation), Defendants.

Citation.

The Hon. James H. Wright, chief justice of the supreme court of the Territory of Arizona, to the Santa Rita Land and Mining Company (a corporation) and the New Mexico and Arizona Railroad Company (a corporation):

Whereas Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen
131 Aguilar, Victor Aguilar, and Frank Ely have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, the said The Santa — Land and Mining Company (a corporation) and the New Mexico and Arizona Railroad Company (a corporation), and have filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Prescott, in the Territory of Arizona, the 11th day of February, in the year of our Lord one thousand eight hundred and eighth-nine.

JAMES H. WRIGHT,
Chief Justice.

Service of the foregoing citation is hereby acknowledged.
April 1st, 1889.

THOMAS MITCHELL,
Att'y for Defendants.

(Endorsed:) Filed April 10th, 1889. J. E. Walker, clerk.

132 In the Supreme Court of the United States.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Appellants,

vs.

THE SANTA RITA LAND AND MINING COMPANY (a Corporation) and The New Mexico and Arizona Railroad Company (a Corporation), Appellees.

Assignment of Errors.

I.

That the judgment and decree of the court below is contrary to evidence and the findings of fact as found by the court, in this:

That it appears from the same that defendants have no estate, title, or interest in the lands described in the complaint, and that plaintiffs are the owners in fee simple thereof; that it appears from said findings of fact that the lands described in the com-

133 plaint were granted in fee by the government of Mexico to one Francisco A. Aguilar.

That in 1869 said Aguilar conveyed a life estate in and to all said lands to one Manuel M. Gandara.

That said Aguilar died in 1876 and said Gandara died in 1878.

That plaintiffs are the heirs and grantees of the heirs of said Aguilar, and as such are the owners of the reversion.

That defendants claim title by mesne conveyances under said Gandara and adverse to plaintiffs.

II.

The court erred in admitting in evidence the purported conveyance of 1856 from Francisco A. Aguilar to Manuel M. Gandara for the following reasons:

1st. That said instrument is irrelevant, incompetent, and immaterial.

2nd. That said instrument does not purport to be an instrument in writing executed by Francisco A. Aguilar, but does purport to be merely the certificate of a judge of a court without a seal.

3rd. That said instrument is not a conveyance of real property for the reasons: (*a*) That it is merely the certificate of a judge without a seal—an unauthorized officer; (*b*) that the same is not acknowledged by Francisco A. Aguilar or any legal agent or attorney of his; (*c*) that it does not contain any words of grant or sale; (*d*) that it does not contain any price or consideration and none

134 was shown or avowed; (*e*) that it is not under seal; (*f*) that it contains no description of any real property.

4th. That said instrument upon its face does not purport to be a

deed of conveyance or gift, but does purport to be a power of attorney from Francisco A. Aguilar to Manuel M. Gandara, and there is no evidence or avowal that any deed or conveyance was ever made or attempted to be made thereunder.

5th. That said written instrument is not good as a contract to sell or convey real property for the reasons above stated.

6th. That it was not shown that said instrument was ever delivered to Francisco A. Aguilar or by any agent or attorney of his or by any person for him unto Manuel M. Gandara or any person whatsoever.

As fully appears by plaintiffs' bill of exceptions No. 1.

III.

The court erred in admitting in evidence the purported petition of Manuel M. Gandara to the U. S. surveyor general for the Territory of Arizona for the confirmation of the land grant therein described for the following reasons:

1st. That the same is irrelevant, incompetent, and immaterial.

2nd. That the same was signed by one W. Claude Jones as the attorney for the said Manuel M. Gandara, and there is no evidence showing or tending to show that said W. Claude Jones was the attorney for said Manuel Gandara.

135 3rd. That there is no evidence showing or tending to show that the statements in said document set forth were ever made by Manuel Gandara or by any one for him with his knowledge.

4th. That said document and petition is not verified by the oath of Manuel Gandara or said W. Claude Jones or of any other person or persons whatsoever, and is not competent evidence of any statement or allegation set forth therein.

5th. That there is no law authorizing, permitting, or requiring the filing of such document with the surveyor general of Arizona, and the same is irrelevant and immaterial for any purpose.

As appears by plaintiffs' bill of exceptions No. 2.

IV.

The court erred in admitting in evidence the report of said surveyor general of the Territory of Arizona recommending the confirmation of said land grant to C. P. Sykes and John Curry for the following reasons:

1. That the same is irrelevant, incompetent, and immaterial.

2. That the said surveyor general was without jurisdiction to make any report or decision which could in any way affect the plaintiffs' right to the lands in controversy for the reason that said land grant was a perfect grant, vesting a complete and perfect title in Francisco A. Aguilar before the treaty of cession known as the Gadsden purchase, in 1854.

3. That said Francisco A. Aguilar had not nor had any of these plaintiffs submitted their claim or title to said sur-

136 veyor general for decision or report thereon or otherwise, and that the title and rights of these plaintiffs were never investigated or passed upon by said surveyor general.

4. That said surveyor general had no authority, power, or jurisdiction to investigate, pass upon, or determine the right of these plaintiffs or any of them or the person or persons under whom they claim in and to said premises in dispute.

As appears by plaintiffs' bill of exceptions No. 3.

V.

The court erred in dismissing the complaint in this action and in not rendering its judgment and decree in favor of plaintiffs and against defendants, as prayed for in said complaint, for the reasons above set forth.

VI.

That the judgment and decree of the lower court is against the law, in this, that it appears from the facts, as found by the district court and as found and adopted by the supreme court of the Territory of Arizona, that plaintiffs were the owners in fee of the property in dispute; that the defendants had no estate, right, title, or interest therein; that plaintiffs were entitled to a decree quieting their title to said property as against said defendants and each of them, as prayed for in plaintiffs' complaint.

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VII.

The court erred in denying plaintiffs' motion for a new trial for the reasons set forth in said motion.

As appears in plaintiffs' bill of exceptions No. 4.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Attorneys for Appellants.

(Endorsed:) Filed March 30th, 1889. J. E. Walker, clerk.

138 SUPREME COURT, } ss:
Territory of Arizona, }

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing printed and written pages (numbered from 1 to 137, inclusive) are a full, true, and correct transcript of the record and proceedings in the cause entitled Dolores G. Astiazaran *et al. vs.* The Santa Rita Land and Mining Company *et al.*, therein named, as the same appears of record and on file in my office.

Seal United States Supreme Court, Arizona.

Witness my hand and the seal of said court this 19th day of April, A. D. 1889.

J. E. WALKER, *Clerk.*

139 In the Supreme Court of the United States.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Plaintiffs,

vs.

THE SANTA RITA LAND AND MINING COMPANY (a Corporation) and The New Mexico and Arizona Railroad Company (a Corporation), Defendants.

Citation.

The Hon. James H. Wright, chief justice of the supreme court of the Territory of Arizona, to the Santa Rita Land & Mining Company (a corporation) and the New Mexico and Arizona Railroad Company (a corporation):

Whereas Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen
140 Aguilar, Victor Aguilar, and Frank Ely have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, the said The Santa — Land and Mining Company (a corporation) and the New Mexico and Arizona Railroad Company (a corporation), and have filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Prescott, in the Territory of Arizona, the 11th day of Feb'y, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. WRIGHT,
Chief Justice.

Service of the foregoing citation is hereby acknowledged.
THOMAS MITCHELL,
Att'y for Defendants.

April 1, 1889.

141 [Endorsed:] No. 233. In the Supreme Court of U. S. Dolores G. Astiazaran *et al.*, plaintiffs, *vs.* The Santa Rita Land and Mining Co. (a corporation) *et al.*, defendants. Citation. Jeffords & Franklin, Rochester Ford, attorneys of pl't'ffs and appellants. Filed April 10th, 1889. J. E. Walker, clerk.

Endorsed on cover: Arizona Territory supreme court. No. 1159. Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, *et al.*, appellants, *vs.* The Santa Rita Land & Mining Company & The New Mexico and Arizona Railroad Company. Filed May 31, 1889.

1 3

UNITED STATES SUPREME COURT.

THE UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States to the judges of the supreme court of the Territory of Arizona, Greeting:

Whereas in a certain suit in said *said* supreme court between Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, appellants, and The Santa Rita Land and Mining Company and The New Mexico and Arizona Railroad Company, respondents, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings in said cause has been suggested, to wit, that the record herein does not disclose a formal decree or judgment of said supreme court of the Territory of Arizona, entered in conformity with the opinion of said court:

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of November, A. D. 1892.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

In the Supreme Court of the Territory of Arizona.

DOLORES ASTIAZARAN *et al.*, Appellants,
vs.
SANTA RITA LAND & MINING CO., Appellees.

In accordance with the writ of certiorari of the Supreme Court of the United States heretofore issued in the case of Dolores G. Astiazaran, Jesus A. de Oceguera, Francisco Oceguera, Carmen O. de Espriu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, and Frank Ely, appellants, and The Santa Rita Land and Mining Company and The New Mexico and Arizona Railroad Company, respondents, and served upon me on the twenty-second day of November, A. D. 1892, I hereby certify that I have searched the records and proceedings in

said cause in the supreme court of the Territory of Arizona, and that I find that said records and proceedings disclose the following decree or judgment of said supreme court of the Territory of Arizona, to wit:

Witness my hand and the seal of said court this 23rd day of November, A. D. 1892.

[Seal Supreme Court of Arizona.]

T. D. HAMMOND,
Clerk of the Supreme Court of Arizona.

In the Supreme Court of the Territory of Arizona.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO Oceguera, Carmen O. de Esprieu, Augustina O. de Robinson, Francisco Gandara, Migel Gandara, Ana Gandara, Trinidad Aguilar, Fernando Aguilar, Anita Aguilar, Jesus Aguilar, Carmen Aguilar, Victor Aguilar, and Frank Ely, Appellants,

vs.

THE SANTA RITA LAND AND MINING COMPANY and THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Appellees.

Appealed from Pima county.

This cause having been submitted to the court for consideration thereof, and the court being fully advised in the premises, it is by the court ordered, adjudged, and decred that the judgment of the court below be, and the same is hereby, affirmed.

Decision by Chief Justice Wright, Associate Justices Barnes and Porter concurring.

Judgment entered this 19th day of January, A. D. 1889.

Attest: WILLIAM WILKERSON, *Clerk.*

[Endorsed:] Case No. 13,566. Supreme Court U. S., October term, 1892. Term No., 43. Dolores G. Astiazaran *et al.*, app'ts, *vs.* The Santa Rita Land & Mining Co. *et al.* Writ of certiorari and return. Filed Dec. 5, 1892.

Supr. Court U.S.
FILED
APR 11 1892
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1891.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO OCEGUERA, ET AL.,
Appellants,

vs.

THE SANTA RITA LAND & MINING COMPANY AND THE NEW MEXICO & ARIZONA RAILROAD COMPANY.

No. 366.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANTS.

ROCHESTER FORD,
Attorney for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1891.

DOLORES G. ASTIAZARAN, JESUS A. DE OCEGUERA, FRANCISCO OCEGUERA, ET AL.,
Appellants,

vs.

THE SANTA RITA LAND & MINING COMPANY AND THE NEW MEXICO & ARIZONA RAILROAD COMPANY.

No. 366.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANTS.

STATEMENT OF THE CASE.

This is a complaint filed in a district court of the Territory of Arizona and County of Pima, in an action to quiet title, brought under section 1, p. 116, of the Laws of Arizona Territory, 1881. The statute is identical with section 738 of the Code of Civil Procedure of California, and is as follows:

"An action may be brought by any person against

another who claims an estate or interest in said real property adverse to him, for the purpose of determining such adverse claim."

The statute as it originally stood in California and Arizona was as follows (Comp. Laws of Arizona, section 256, p. 449; section 254, Laws of California, 1851):

"An action may be brought by any person in possession by himself or his tenant of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

The Compiled Laws of Arizona provide (section 1, p. 409), that "there shall be in this Territory but one form of civil action," and that the complaint shall contain "a statement of the facts constituting the cause of action in ordinary and concise language, and a demand of the relief which plaintiff claims." (Section 39, p. 414.)

In their complaint filed under these statutes, plaintiffs allege (record, p. 21) that they are the owners in fee of all that certain piece or parcel of land situated in the County of Pima, Territory of Arizona, commonly known and called the "Ranchos Tumacacori, Calabasas and Huevavi," being the same lands and premises sold and granted by the Mexican government to Francisco Alexandro Aguilar on the 19th day of April, 1844, containing about fifty-two thousand acres; that the defendants, and each of them, claim an estate or interest in and to said lands adverse to plaintiffs; that the claim of the defendants, and each of them, is without any right whatsoever, and that defendants have not, nor has either of them, any estate, right, title or interest whatever in said lands or premises, or any part thereof. Wherefore plaintiffs pray:

"1st. That the defendants, and each of them, be required to set forth the nature of their said claims, and that all adverse claims of the defendants, and each of them, may be determined by a decree of this court.

"2d. That by said decree it may be declared and adjudged that the defendants have no estate or interest whatever in or to said lands and premises, or in or to any part thereof, and that the title of plaintiffs is good and valid.

"3d. That the defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said lands or premises, or any part thereof, adverse to said plaintiffs, or to any of them, and for such other and further relief as shall be meet and agreeable to equity, and for their costs of suit."

The defendants demurred to the complaint on the ground that it was not sufficient in law.

Defendant, the Santa Rita Land & Mining Company, answered, also (record, p. 3), denying the allegations of plaintiffs' complaint, and alleging that Aguilar, to whom, as it is conceded, the premises were granted in fee by the Mexican government, had sold the same in fee to one Manuel Maria Gandara, from whom, by sundry mesne conveyances, defendants claim title. It was alleged also that defendants' immediate grantors, C. P. Sykes and John Curry, had presented to the Surveyor General of Arizona a petition, accompanying which were the title-papers and original expediente of said grant, praying for a confirmation thereof, and that the Surveyor General had recommended a confirmation of said lands to said Sykes and Curry.

Defendant, the New Mexico & Arizona Railroad Company, filed a similar answer, and alleged title to

so much of the premises as it occupies with its road-bed, right of way, etc., by virtue of condemnation proceedings against the Santa Rita Land & Mining Company.

Both defendants pleaded the territorial statute of limitations.

The case was tried on an agreed statement of facts, which was adopted by the district court (record, p. 6), and also by the Supreme Court of the Territory as its findings of fact (record, pp. 60, 61).

The facts on which this controversy depends are as follows: The Mexican government, in 1844, sold and conveyed the premises by certain original title-papers, which it is admitted vested a perfect title in fee in Francisco A. Aguilar. Plaintiffs are the heirs and grantees of the heirs of said Aguilar.

In support of their title defendants offered against plaintiffs' objections the following instruments, which it was stipulated were signed at the time and place and by the persons when, where and by whom they purport to have been signed (record, pp. 33–36). As this controversy turns almost entirely on these instruments, they are given in full:

INSTRUMENT OF 1856.

"PORT OF GUAYMAS, March 31st, 1856.

"Before me, Pedro de Valois, judge of the 2d inst. of the district, appeared to-day Mr. D. Francisco A. Aguilar, of this city, exhibiting the present title, consisting of thirty-nine written sheets, which proves his right, acquired legally and legitimately, to the lands, and which therein are expressed, which he has made over to Mr. Manuel Maria Gandara, with the same rights and concessions that he himself had received from the general treasury of the State, that he may have power, as absolute owner and proprietor thereof, to dispose of them as might best suit his convenience or interests.

Thus I certify that he executed the document and signed it in my presence and that of the witnesses.

P. DE VALOIS.
F. A. AGUILAR.

Witnesses:
QUIRINO ROSAS.
LORENZO POMPA.
JESUS GONZALES MENESES.
National and Public Secretary (Notary), Resident of this City.

I certify with all the power of law that the signature with which is provided the foregoing deed of transfer, and which is 'P. de Valois,' is the signature of said judge, who at the time was the judge of the 1st instance of Guaymas, as he states, and that it is the same signature which he habitually uses in all his business, public and private, and that as such it is to be considered of good faith and credit in judicial business and otherwise.

In witness whereof, I thus certify and sign this certificate, in the City of Hermosillo, State of Sonora, in the Republic of Mexico, on the tenth day of October, one thousand eight hundred and sixty-one.

JESUS MENESES.

[RUBRICA.] E. N'ly P.
(National and Public Notary.)"

The said document is endorsed upon a copy of the "expediente," written upon 39 sheets of official paper, with the seal of the years 1856-'7 engraved and the seal of the Republic of Mexico stamped on each sheet, and which is certified as follows:

"It (this copy) agrees with its originals, which are in the possession of Don Manuel Maria Gandara, at whose request this copy has been made on these thirty-nine sheets with the proper seal, and I authorize the same, signing with my assisting witnesses.

RAMON T. CUEN.

Witness: J. GABRIEL SALCIDO.
Witness: JESUS P. FURTEL.

Lic. Jose de Aguilar, governor of Sonora.

I certify that the signature which precedes, of

Ramon T. Cuen, judge of the first instance of civil matters of the district of Ures, is that which he uses and employs in all his official acts.

In witness whereof I give these presents at Ures this 27th day of March, 1858.

JOSE AGUILAR.

Government of Sonora.

INSTRUMENT OF 1869.

In the city of Guaymas of Zoragoza, on the second day of the month of March, 1869, before me, Jose Bustamente, judge of first instance of the district, the ordinary assisting witnesses, with whom I act for want of a notary public, and the instrumental witnesses, who will be mentioned at the end of this instrument, appeared Don Francisco A. Aguilar and Don Miguel Gandara, in representation of his father, Don Manuel Gandara, as shown by the general power executed in his favor in the City of San Luis Potesi, on the 28th of January, 1868, before the notary, Don Isadoro Cobrello, which power I certify that I have seen, and the first having proved himself to be solvent with the pueblo (public) treasury and registered in the registry of the national guard, as shown by the certificates presented, which I also certify that I have seen, both of lawful age, the first a resident of this city, and the second of Ures, who said that consulting their mutual interests that they agreed in the sale of the lands called Tumacacori, Calabasas, and Huebabi, situated in the Territory of Arizona, belonging to the United States, which lands belong to the vendor by virtue of a title of sale, transfer, and adjudication in his favor by the treasury of the department of Sonora in the year 1844, all of which is based on a primitive title issued in 1807 for the said lands to the natives of Tumacacori as a fundo legal of their pueblo and estancia (stock rancho) for the same, by virtue of which they being in full dominion to the said Don Francisco A. Aguilar; and, in order to carry out the said sale in due form of law, the said Don Francisco declares that he gives, as sale to Don Miguel Gandara, in representation of his father Don Manuel Maria Gandara,

said lands, declaring that he has not sold, alienated, or mortgaged the same; that they are clear of all responsibility and encumbrances; as such he sells the same, with all their uses and servitudes and all things thereto annexed that they have had or have pertaining thereto, according to law, for the sum of four hundred and ninety-nine dollars, which they have secured to their entire satisfaction, and the said sum being paid and satisfied, he executed in favor of Don Miguel Gandara, in representation of his father, Don Manuel Maria Gandara, the receipt. He also declares that the said amount of $499 is the just and true value of said lands, the ownership and dominion of which he renounces, cedes, and transfers in favor of the representative of Senor Gandara, so that he may dispose of the same as a thing belonging to him, acquired by just and legal title, and that he may take the possession that of right belongs to him; and since the delivery of the money does not appear, he renounces the law 9, title I, partida 5, and finally he obligates himself for the security of this place; and in the same act Don Miguel Gandara, to whom I certify the title referred to was delivered, as also the accompanying map, in representation of his father, Don Manuel Maria Gandara, said that he accepted this writing in all its parts, both parties obligating themselves to the fulfillment of what is set forth in the same, with all their property, present and future, declaring that there is no fraud or deceit in the matter, and if there should be, in large or small amount, they make of the same mutual donation final and irrevocable, renouncing all right of action and the time allowed by law for commencing the same. Thus they said and signed, being advised that this document was to be registered in the office of mortgages within the term of eight days, the taxes being personally paid into the public treasury under the penalty of the nullity of this instrument if the same should not be done.

The citizens, Angel Rodrigues, Juan Encinas,

and Rafael S. Canez, who are present. Having witnessed which I attest

FRANCISCO A. AGUILAR.
MIGUEL GANDARA.

Instrumental w's: ANGEL RODRIGUES.
Instrumental w's: JUAN ENCINAS.
Instrumental w's: RAFAEL CANEZ.
Before me: JOSE BUSTAMENTE.
Assistant: CHARLES R. VALENZUELA.
Assistant: EDWARD MORALES.

March 3rd, 1869, the sum of $24.95, the corresponding tax of five per cent. on the sum of $499 for the transfer of dominion, as set forth in the foregoing deed, has been paid by Don Miguel Gandara in representation of his father, Don Manuel Maria Gandara, with the corresponding impost of 25 per cent. Federal tax.

GUAYMAS, *March*—, 1869.

This deed remains registered in folio 2, verso, and 3 front of the respective book; all of which I authorized and signed with the assisting witnesses.

JOSE BUSTAMENTE. [SEAL.]

Assistants:
CARLOS R. VALENZUELA.
JOSE MARIA VIZCANO.

Aguilar died in 1876 and Manuel M. Gandara in 1878.

By sundry mesne conveyances, the validity of which is not in question, any title or interest which Gandara may have acquired by the foregoing instruments was transferred to C. P. Sykes and John Curry, and by them to defendant, the Santa Rita Land & Mining Company. The Arizona & New Mexico Railroad Company, as above stated, claims under the Santa Rita Land & Mining Company by condemnation proceedings.

Said Sykes and Curry, as grantees of Gandara, presented on December, 15, 1879, to the Surveyor General of Arizona a petition praying for the con-

firmation of the premises to them. The report of the Surveyor General (record, p. 44), which was put in evidence over plaintiffs' objection, pronounced the grant genuine, and recommended confirmation to said Sykes and Curry.

The findings show that defendants entered into possession of a part of the premises in controversy on September 21, 1881, and that in the latter part of December, 1882, or in January, 1883, they placed a large number of cattle upon the lands, and have ever since used the same for pasturage, and that in 1882 and since then they have paid the taxes assessed against said land (record, p. 46).

Santiago Ainsa, the grantee of a portion of the interest of the heirs of Aguilar, and the grantor of Frank Ely, one of the plaintiffs, had notice that defendants claimed the land in controversy.

The grant was at the time of this suit pending before Congress, that body having taken no action on the report of the Surveyor General.

It was stipulated and found that Prince's Laws of New Mexico contain true copies of the Laws of New Mexico.

The court dismissed the complaint, basing its decisions on two reasons (record, p. 56): "1st, because the court had no jurisdiction; 2d, if it had, the complaint did not state facts sufficient to constitute a cause of action in equity and justified no relief in equity."

From this decision plaintiffs duly perfected their appeal to this court.

SPECIFICATION OF ERRORS.

I.

That the judgment and decree of the court below is contrary to evidence and the findings of fact as found by the court, in this:

That it appears from the same that defendants have no estate, title, or interest in the lands described in the complaint, and that plaintiffs are the owners in fee simple thereof; that it appears from said findings of fact that the lands described in the complaint were granted in fee by the government of Mexico to one Francisco A. Aguilar.

That in 1869 said Aguilar conveyed a life estate in and to all said lands to one Manuel M. Gandara.

That said Aguilar died in 1876 and said Gandara died in 1878.

That plaintiffs are the heirs and grantees of the heirs of said Aguilar, and as such are the owners of the reversion.

That defendants claim title by mesne conveyances under said Gandara and adverse to plaintiffs.

II.

The court erred in admitting in evidence the purported conveyance of 1856 from Francisco A. Aguilar to Manuel M. Gandara for the following reasons:

1st. That said instrument is irrelevant, incompetent, and immaterial.

2d. That said instrument does not purport to be an instrument in writing executed by Francisco A. Aguilar, but does purport to be merely the certificate of a judge of a court without a seal.

3d. That said instrument is not a conveyance

of real property for the reasons: (*a*) That it is merely the certificate of a judge without a seal—an unauthorized officer; (*b*) that the same is not acknowledged by Francisco A. Aguilar or any legal agent or attorney of his; (*c*) that it does not contain any words of grant or sale; (*d*) that it does not contain any price or consideration and none was shown or avowed; (*e*) that it is not under seal; (*f*) that it contains no description of any real property.

4th. That said instrument upon its face does not purport to be a deed of conveyance or gift, but does purport to be a power of attorney from Francisco A. Aguilar to Manuel M. Gandara, and there is no evidence or avowal that any deed or conveyance was ever made or attempted to be made thereunder.

5th. That said written instrument is not good as a contract to sell or convey real property for the reasons above stated.

6th. That it was not shown that said instrument was ever delivered to Francisco A. Aguilar or by any agent or attorney of his or by any person for him unto Manuel M. Gandara or any person whatsoever.

The said instrument is as follows:

"PORT OF GUAYMAS, *March 31st*, 1856.

Before me, Pedro de Valois, judge of the 2d inst. of the district, appeared to-day Mr. D. Francisco A. Aguilar of this city, exhibiting the present title, consisting of 39 written sheets, which proves his rights, acquired legally and legitimately, to the lands, and which therein are expressed, which he has made over to Mr. Manuel Maria Gandara, with the same rights and concessions that he himself had received from the general treasury of the State, that he may have power, as absolute owner and proprietor thereof, to dispose of them as might best suit his convenience or interests. Thus I certify that he executed the

document and signed it in my presence and that of the witnesses.

P. DE VALOIS.
F. A. AGUILAR.

Witnesses:

QUIRINO ROSAS.
LORENZO POMPA.
JESUS GONZALES MENESES,
National and Public Secretary (Notary),
Resident of this City.

I certify with all the power of law that the signature with which is provided the foregoing deed of transfer, and which is "P. de Valois," is the signature of the said judge who at the time was judge of the 1st instance of Guaymas, as he states, and that it is the same signature which he habitually uses in all his business, public and private, and that as such it is to be considered of good faith and credit in judicial business and otherwise.

In witness whereof I thus certify and sign this certificate, in the City of Hermosillo, State of Sonora, in the Republic of Mexico, on the tenth day of October, one thousand eight hundred and sixty-one.

[RUBRICA.] JESUS MENESES,
E. N'ly P. (National & Public Notary.")

III.

The court erred in admitting in evidence the purported petition of Manuel M. Gandara to the U. S. Surveyor General for the Territory of Arizona for the confirmation of the land grant therein described for the following reasons:

1st. That the same is irrelevant, incompetent, and immaterial.

2d. That the same was signed by one W. Claude Jones as the attorney for the said Manuel M. Gandara, and there is no evidence showing or tending

to show that said W. Claude Jones was the attorney for said Manuel Gandara.

3d. That there is no evidence showing or tending to show that the statements in said document set forth were ever made by Manuel Gandara or by any one for him with his knowledge.

4th. That said document and petition is not verified by the oath of Manuel Gandara or said W. Claude Jones or of any other person or persons whatsoever, and is not competent evidence of any statement or allegation set forth therein.

5th. That there is no law authorizing, permitting, or requiring the filing of such document with the Surveyor General of Arizona, and the same is irrelevant and immaterial for any purpose.

This petition is given in full on page 38 of the record. It is in substance only a declaration of Manuel Gandara that he is the owner in fee simple of the premises in controversy, and a prayer that the same be investigated and confirmed to him.

IV.

The court erred in admitting in evidence the report of said Surveyor General of the Territory of Arizona recommending the confirmation of said land grant to C. P. Sykes and John Curry for the following reasons:

1. That the same is irrelevant, incompetent, and immaterial.

2. That the said Surveyor General was without jurisdiction to make any report or decision which could in any way affect the plaintiffs' right to the lands in controversy for the reason that said land grant was a perfect grant, vesting a complete and per-

fect title in Francisco A. Aguilar before the treaty of session known as the Gadsden purchase, in 1854.

3. That said Francisco A. Aguilar had not nor had any of these plaintiffs submitted their claim or title to said Surveyor General for decision or report thereon or otherwise, and that the title and rights of these plaintiffs were never investigated or passed upon by said Surveyor General.

4. That said Surveyor General had no authority, power, or jurisdiction to investigate, pass upon, or determine the right of these plaintiffs or any of them, or the person or persons under whom they claim, in and to said premises in dispute.

The said opinion and recommendation of the Surveyor General are given in full on pages 44–45 of the record. It is in substance a report that the title-papers are valid, and concludes "I therefore recommend a confirmation to the claimants, C. P. Sykes and John Curry," of the premises prayed for. It is to this recommendation that plaintiffs specifically excepted.

V.

The court erred in dismissing the complaint in this action and in not rendering its judgment and decree in favor of plaintiffs and against defendants, as prayed for in said complaint, for the reasons above set forth.

VI.

That the judgment and decree of the lower court is against the law, in this, that it appears from the facts, as found by the district court and as found and adopted by the Supreme Court of the Territory of Arizona, that plaintiffs were the owners in fee of the

property in dispute; that the defendants had no estate, right, title, or interest therein; that plaintiffs were entitled to a decree quieting their title to said property as against said defendants, and each of them, as prayed for in plaintiffs' complaint.

VII.

The court erred in denying plaintiffs' motion for a new trial for the reasons set forth in said motion.

POINTS AND AUTHORITIES.

I.

The complaint states facts sufficient to constitute a cause of action.

Ely *v.* New Mexico, etc. Railroad Co., 129 U. S., 291.

Payne *v.* Treadwell, 16 Cal., 220, 242–247.

Statham *v.* Dusey (Supreme Court of California), 11 Pac. Rep., 606.

Heeser *v.* Miller, 19 Pac. Rep., 375.

Tritipo *v.* Morgan, 99 Ind., 269.

II.

The court had jurisdiction because—

(a) The grant to Aguilar is a perfect or complete title, and needs no legislative confirmation.

Gadsden treaty, June 30, 1854.

Maguire *v.* Tyler, 8 Wall., 650.

Dent *v.* Emmeger, 14 Wall., 108.

Trenier *v.* Stewart, 101 U. S., 797.

Strother *v.* Lucas, 12 Pet., 412.

Perchman's Case, 7 Pet., 86.

U. S. *v.* Wiggins, 14 Pet., 350.
Hancock *v.* McKinney, 7 Tex., 384.

(b.) The Surveyor General of Arizona, under the acts of Congress of July 22, 1854, and July 15, 1870, has no jurisdiction to decide conflicting claims or titles to Mexican grants, and his report is no evidence of title or right of possession.

U. S. Stat. at Large, Vol. 10, p. 238.
U. S. Stat. at Large Vol. 16, p. 291.
Pinkerton *v.* Ledoux, 129 U. S., 346–355.

III.

The court erred in admitting the petition of Gandara to the Surveyor General (record, pp. 38–42), and the recommendation of the Surveyor General in favor of Sykes and Curry.

Pinkerton *v.* Ledoux, *supra*.

IV.

The title and disposition of real property is subject exclusively to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another.

McCormick *v.* Sullivan, 10 Wheat., 193.
Kerr *v.* Moon, 9 Wheat., 571.
Brine *v.* Insurance Co., 6 Otto, 627.

V.

The instrument of 1856 (being the so-called deed from Aguilar to Manuel M. Gandara) was made while the premises were part of the Territory of New Mexico. It is not a deed under the common law, nor is it a conveyance under the laws of New Mexico in

force at the date of its execution. If it is valid for any purpose it would be merely as a power to sell.

See such instrument, *ante*, p. 4; record, p. 33.

See statutes of the Territory of New Mexico relative to the conveyance of real property, in force when such instrument was executed, as follows:

"Section 1. Any person or persons, or body politic holding, or who may hold, any right or title to real estate in this Territory, be it absolute or limited, by possession, in part payment or transfer, may convey the same in the manner and subject to the restrictions prescribed in this act.

"Sec. 2. The term real estate, as used in this act, shall be so construed as to be applicable to lands, tenements, and hereditaments, including all real movable property.

"Sec. 3. The words bargained and sold, or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect:

First. That the conveyor at the time of the execution of said conveyance, is in possession of a title in fee simple to the property so conveyed.

Second. That the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the conveyor, or by any person claiming the same under him.

Third. For the greater security of the person, his heir and assignees, to whom said real estate is conveyed by the conveyor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance.

"Sec. 4. All conveyances of real estate shall be subscribed by the person transferring his title or interest in said real estate, or by his legal agent or attorney.

"Sec. 5. Every instrument in writing by which

real estate is transferred or affected, in law or equity, shall be acknowledged and certified to in the manner hereinafter prescribed.

"Sec. 6. The acknowledgment of all conveyances or writings affecting any real estate, in law or equity, shall be taken before any of the following named officers:

If the acknowledgment is made within the Territory it shall be made before any court having a seal, if by any judge, justice of the peace or clerk, in the same manner, or by any justice of the peace in the county wherein said real estate is situated.

If taken without the Territory and within the United States, the acknowledgment to be taken before any United States court, or the court of any State or Territory, within the said United States having a seal, or by any clerk of any of said courts.

If acknowledged beyond the limits of the United States it shall be done before any court of any State, kingdom or empire having a seal, or by the magistrate, or supreme power of any city who may have a seal.

"Sec. 7. No acknowledgment of any writing, purporting to be a conveyance of real estate, or by which the same may be affected in law or equity, shall be taken unless the person offering to make the same is personally known to, at least, one of the judges of the court, or to the officer taking the same, to be the person whose name is subscribed to said writing, or is proven to be the person by two reliable witnesses.

"Sec. 8. The certificate of acknowledgment shall express the fact of the acknowledgment being made, and also, that the person making the same was personally known to at least one of the judges of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the writing, or a party to it, or that it was proven to be such person by the testimony of at least two reliable witnesses.

Sections 9, 10, 11, 12, and 13, provide the method of taking acknowledgments of married women.

"Sec. 14. All writings conveying real estate, or by which real estate may be affected in law or equity,

which shall be signed, acknowledged and certified to in the manner above prescribed, shall be registered in the office of the archives of the county wherein said real estate is situated.

"Sec. 15. All such instruments of conveyance, after they shall be signed, certified and registered in the manner above prescribed, shall give notice of the time of its being registered in the office of the register, to all persons mentioned in said conveyance; and all purchasers and mortgagees shall be considered in law and equity to have purchased under said notice.

"Sec. 16. None of said writings shall be valid except to the parties interested and those who have actual notice of the same, until it shall be deposited in the office of the clerk to be registered.

Sec. 17. As to estates in common.

"Sec. 18. All powers of attorney or other writing containing authority to convey real estate as agent or attorney of the owner of the same, or to execute as agent for another all conveyances of real estate, or by which real estate may be affected in law and equity, shall be acknowledged, certified and registered, as other writings conveying or affecting real estate are required to be acknowledged, certified and registered.

"Sec. 19. No such power of attorney or other writing, certified and registered in the manner prescribed in the foregoing section, shall be considered revoked by any act of the party executing the same, until the writing revoking the same shall be deposited with the clerk of the register's office, in which said power of attorney or writing is registered."

Act of January 12th, 1852.

(Prince Gen'l Laws of New Mexico, 1882, pp. 234-237.)

VI.

The instrument of 1869 (being the so-called deed from Aguilar to Miguel Gandara), was made while the premises were part of the Territory of Arizona. Such instrument is not a deed, because it is not under seal.

It contains no words of inheritance, and does not purport to convey more than a life estate.

See such instrument, *ante*, p. 6; record, p. 34.

Blackstone, Book 2, p. 107.

Washburn on Real Prop., 4th ed., *82, * pp. 271–272.

LeFranc *v.* Richmond, 5 Sawyer, 601–603.

U. S. *v.* Crosby, 7 Cranch, 114.

Jackson *v.* Cook, 12 Johns., 74.

See statutes of the Territory of Arizona relative to the conveyance of real property, in force when such instrument was executed, as follows:

"Section 1. Conveyances of lands, or of any estate or interest therein, may be made by deed, signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as hereinafter directed. (Act of November 10, 1864.)

Howell's Code of Arizona, 1864, p. 275.

Compiled Laws of Arizona, 1877, p. 380.

"Section 7. The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, and the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all courts of this Territory.

Howell's Code of Arizona, 1864, pp. 439–441.

Compiled Laws of Arizona, 1877, pp. 570–571.

VII.

The statute of limitations has not run against plaintiffs, because

(*a.*) Such statute begins to run against a Mexican grant only after its confirmation.

Henshaw *v.* Bissell, 18 Wall., 555.

(*b.*) The grant in controversy has not been confirmed by Congress (record, p. 46), and under the Compiled Laws of Arizona, 1877, the statute of limitations did not commence to run against a Mexican grant until its final confirmation by the United States.

See Compiled Laws of Arizona, 1877, Sec. 5, p. 357, as follows:

"Section 5. Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff in ejectment within one year after making such entry, or within five years from the time when the right to bring such action accrued, or within five years after the final confirmation by the United States of any title derived from Spain or Mexico."

Even if the statute of limitations did run against a Mexican grant prior to its final confirmation by Congress, nevertheless defendants have not had such an adverse possession for five years as would permit them to plead a bar.

See Compiled Laws Arizona, 1877, Secs. 6 and 8, p. 357, as follows:

"Sec. 6. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof, within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action.

"Sec. 8. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: 1st. Where it has been usually cultivated and improved. 2d. Where it has been protected by a substantial inclosure. 3d.

Where (although not inclosed) it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry; or for the use of pasturage, or for the ordinary use of the occupant. 4th. When a known lot or single farm has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Compiled Laws of Arizona, p. 357.

ARGUMENT.

As to the first point in the brief, which is that the complaint states facts sufficient to constitute a cause of action, and which takes up the fifth assignment of error, we need only refer the court to the precisely similar complaint adjudged good by this court in Ely *v.* New Mexico & Arizona Railroad Company, 129 U. S., 291, where the question was directly presented. That case and the present one were brought in the same Arizona district court, under the same Arizona statutes, and the allegations of the two complaints are identical in legal effect. Under the authority of the Ely case the complaint herein states a cause of action.

II.

(*a.*) The Supreme Court of Arizona dismissed this complaint, as stated in its opinion, for two reasons: "1st: because the court had no jurisdiction: and, 2d, if it did, the complaint did not state facts sufficient to constitute a cause of action in equity." The facts from which the court imagined it had no jurisdiction do not appear on the face of the complaint, and were not developed till the trial. The first reason, therefore, which the court gives is not only erroneous, as we believe, but, if the second rea-

son is a good one, is quite superfluous: that is to say, if the complaint on the face does not state facts sufficient to constitute a cause of action, it is needless to go further to find other reasons for dismissing the complaint.

We think that the first reason which the court gives is as erroneous as the second. The parties hereto concede, and the title-papers show, and the court finds, that the grant in controversy is a complete and perfect title in fee. The treaty under which the Gadsden purchase was acquired has as Article V the following:

"All the provisions of the eight and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the the same, as fully and effectually as if the said articles were herein again recited and set forth."

The ninth article of the treaty of Guadalupe Hidalgo is the third article of the treaty of Louisiana (April 30, 1803), and is as follows:

"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; *and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.*" [The exact language of the third article of the Louisiana treaty is: "*And in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.*"]

It is thus seen that the third article of the treaty of Louisiana applies to the property ceded by the Gadsden purchase as fully and effectually as if said third article were recited in the Gadsden purchase. Clearly, therefore, any decision on this third article of the treaty of Louisiana is also a decision on the fifth article of the Gadsden treaty, the two articles being the same.

In Maguire *v.* Tyler, 8 Wall., 650, this court says:

"Complete titles to land in the territory ceded by France to the United States, under the treaty concluded at Paris on the 30th of April, 1803, needed no legislative confirmation, as they were fully protected by the third article of the treaty of cession."

The same language is used by this court in Trenier *v.* Stewart, 101 U. S., *supra*, at page 802.

It follows, therefore, that complete titles to land embraced in the territory ceded to the United States by the Gadsden purchase needed no legislative confirmation, as they were fully protected by the same article of the treaty of cession, that article being the third in the Louisiana treaty and the fifth in the Gadsden treaty.

The court will observe that the acts of July 22, 1854, and July 15, 1870, unlike the act to ascertain and settle the private land claims in the State of California (9 Stat., 633), do not require that all claims to lands derived from the former government should be presented to the Surveyor General under penalty of being held as part of the public domain if not so presented. We submit that under the Gadsden treaty and the acts above cited there can be no question as to the right of one who had obtained from the former government a full and perfect title, to assert it in the

ordinary forms of law upon the documents under which he claimed.

(*b.*) The lower court argues that the Surveyor General of Arizona, acting under the acts of Congress of July 22, 1854, and July 12, 1870, is a judicial tribunal, and that his opinion not only as to the *bona fides* of a claim presented to him, and whether such claim should be confirmed, but also as to questions of title between rival claimants, is binding on the courts. This court, however, in Pinkerton *v.* Ledoux, 129 U. S., 346, *ante*, in construing the duties of the Surveyor General under the act of July 22, 1854, which was extended to Arizona by the act of July 15, 1870, held that his report is "no evidence of title or right of possession;" that his duty under said act consisted merely in "making inquiries and reporting to Congress for its action. If Congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress it had no effect to establish such boundaries or anything else subservient to the title."

No language could be clearer than the above that the report of the Surveyor General is "no evidence of title or right of possession." With due deference we submit that it was erroneous to the last degree for the lower court to hold that it was deprived of jurisdiction because of an *ex parte* application to and report by the Surveyor General, or that the plaintiffs, claiming to own a perfect grant, and not being required to submit it to the Surveyor General, were in any way affected by his action.

This court in Botiller *v.* Dominguez, 130 U. S., at page 249, in stating the policy upon which the statute to ascertain and settle private land claims in California was founded, and the purposes it was intended

to subserve, said: "Obviously it was not intended to adjust or settle titles between private citizens making claim to the same lands. It is equally clear that the main purpose of the statute was to separate and distinguish the lands which the United States owned as property, which could be sold to others, either absolutely or by permitting them to settle thereon, with preëmption rights, or which could be reserved from sale entirely, from those lands which belonged, either equitably or legally, to private parties under a claim of right derived from the Spanish or Mexican governments."

This same construction of the statute has been announced by this court in a number of cases. Thus, in Meader *v.* Norton, 11 Wall., 442, at page 457, this court says: "Nothing more is contemplated by the proceedings under that act (act of March 3, 1851, 9 Stat. at Large, 633) than the separation of the lands which were owned by individuals from the public domain." So, in Castro *v.* Hendricks, 23 How., 438, Mr. Justice Campbell, in delivering the opinion of this court, said: "The primary object of the act approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property, * * * and so this court have repeatedly declared that the government had no interest in the contests between persons claiming *ex post facto* the grant. United States *v.* Sutter, 21 How. S. C. R., 170." See, also, Brown *v.* Brackett, 21 Wall., 388; Carpentier *v.* Montgomery, 13 Wall., 480; Miller *v.* Dale, 92 U. S., 473.

It does not seem necessary to cite further cases on this point. While the method by which claims were to be confirmed under the acts of July 22, 1854, and July 15, 1870, was different from the method established by the act of March 3, 1851, the objects of

the statutes were, of course, the same, and obviously the acts applicable to New Mexico and Arizona "were not intended to adjust or settle titles between private citizens making claim to the said lands."

Under the foregoing authorities we respectfully submit that the Supreme Court of Arizona erred in holding that the action of the Surveyor General deprived the court of jurisdiction in this case.

III.

Relying on the language of this court in Pinkerton *v.* Ledoux, *supra*, that the report of the Surveyor General is "no evidence of title or right of possession," we submit that the lower court erred in admitting in evidence the petition of Manuel Gandara to the Surveyor General, and in admitting his recommendation in favor of Sykes and Curry. Plaintiffs were not parties to these procedings before the Surveyor General. The petition of Gandara contains merely his unverified assertions as to his ownership of the property, and the Surveyor General's recommendation in favor of Sykes and Curry is merely the expression of his opinion, which had not been acted on by Congress, and hence has no legal effect whatever.

IV.

The rule of law quoted in our fourth point is too firmly established to call for any argument.

V. AND VI.

Assuming that the complaint herein states a cause of action, and that the court has jurisdiction, and that the proceedings before the Surveyor General were incompetent and immaterial, we come to the point on which this case turns, in our opinion. As

plaintiffs are the heirs and grantees of heirs of Aguilar, the common source of title, they are entitled to a decree in their favor, unless the instruments of 1856 and 1869 conveyed the fee. We think they did not, for the following reasons:

The instrument of 1856, made while the premises were part of the Territory of New Mexico, is no conveyance under the laws then existing, and given in full, *ante*, page 4, because it has no seal. The words "deed" and "conveyance" are synonymous, and to "convey" real estate, as the word "convey" is used in the above cited laws, is, by an appropriate instrument, to transfer the legal title from the present holder to another. Abendroth *v.* Town of Greenwich, 29 Conn., 365; Edelman *v.* Yeakel, 27 Pa., 29. To convey imports an instrument under seal (Livermore *v.* Bagley, 3 Mass., 510), and involves a transfer of a freehold estate (Hutchinson *v.* Bramhall, 42 N. J. Eq., 385).

That the conveyances of real estate in the statutes above cited mean sealed instruments seems to be shown by the subsequent acts of the legislature of New Mexico. The Laws of 1874, Chapter 14, entitled "An act with reference to the conveyance of Real Estate," provide as follows:

Section 1. Hereafter, on all deeds of conveyance, mortgages, bonds or contracts for the delivery, or making of a deed of conveyance or mortgage, and documents referring to, or in any manner affecting real estate in this Territory, a scroll may be used as a seal by the parties thereto, instead of a wafer, wax or other impression required by the common law.

Section 2. All deeds of conveyance, mortgages or other documents referring to, or in any manner affecting real estate in this Territory, heretofore made or executed in good faith by the parties thereto, and sealed with a scroll by the grantor or grantee, in so

far as the same might have been affected thereby, are hereby confirmed and declared legal and binding in law, to the same extent as if said seal had been a waxen wafer impression: and no objection will be held tenable in any of the courts of this Territory, which may object to the sufficiency of any deed of conveyance, mortgage or other document, affecting or referring to real estate, for the reason that the same has not been, or may not be sealed by the grantor or grantee with a wax seal or other article in which an impression could be made: provided the same have a scroll affixed instead of such a seal.

If it be urged that a seal is arbitrary, the answer is, in the language of the court in Taylor *v.* Morton, 5 Dana, 365, "all law, common or statutory, which requires a seal is now perfectly arbitrary: nevertheless it is law, and cannot be repealed or modified by judicial discretion or judicial legislation. The term 'deed' signifies a writing with a seal, the seal being essential to make the writing a deed."

This proposition is elementary. Among almost any number of authorities which might be quoted as holding that at common law a seal is indispensable to convey an estate in fee-simple, fee-tail or for life, we cite Jackson *v.* Cook, 12 Johns., 74, Jackson *v.* Wendell, 12 Johns., 355, and U. S. *v.* Crosby, 7 Cranch, 114, *supra*, where this court held that an instrument without seal, executed in the West Indies, before a notary public, according to the mode prescribed by the existing laws to pass real estate in that colony, was not sufficient to convey title to land situated in Massachusetts, under the laws of which State no estate in freehold could be conveyed unless by a deed or conveyance under the hand and seal of the party.

If this instrument of 1856 were to be considered or construed under the laws of Mexico, different ques-

tions would be presented, but to be valid it must conform to the laws of New Mexico in force at the time, as before cited, and under those laws we submit that this instrument is no "conveyance," because it lacks a seal.

In the second place, it contains no words of bargain or sale, or words necessary to convey a fee or even a life estate. We submit that the words "made over" cannot, under the common law, the British statute of uses, or the statutes of New Mexico, be held to convey a fee. A valid deed must contain words which show clearly the intent to grant the maker's interest or estate in the premises in question. In McKinney *v.* Settles, 31 Mo., 541, where the only words in the deed indicating such intent were "sign over," the instrument was held to be inoperative as a grant.

In the present case the only words indicating such intent are "made over," which are inoperative as a grant under the authority just cited.

This instrument seems to be fatally defective as a conveyance for the additional reason that there are no words of inheritance. The utmost estate that the instrument could create, if any at all, seems to be a life estate.

The instrument contains no description of any real property. It is impossible to tell from it what lands were referred to.

This instrument appears to be not an intsrument in writing executed by Francisco A. Aguilar, but merely the certificate of a judge without a seal. The intention of the parties must, of course, conform to the rules of law, and judged by the rules above cited the instrument appears to be wholly defective as a conveyance, and it therefore should not have been admitted in evidence. It is not good as a contract to

convey for the reason, among others, that no consideration appears.

The certificate of Ramon T. Cuen (record, p. 34) as to its delivery, is mere heresay, and there seems to be no legal evidence that the instrument was ever delivered.

VI.

When the instrument of 1869 is examined, it will be seen that all the objections urged against the instrument of 1856 apply with even greater force. The laws of Arizona, heretofore quoted, *ante*, page 21, expressly provide that "conveyances of lands, or of any estate or interest therein, may be made by deed." The common law of England was adopted and made the rule of decision in all courts of the Territory, and section 6, chapter 36 of the Code of Arizona, approved November 10, 1864, and in force when the instrument of 1869 was executed, enacts that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing."

As this instrument of 1869 has no seal, it clearly cannot pass title to the property. It does not contain the word "heirs," or any words, if there were any other, by which a fee could be created. If it were good for anything at all, it would be only for a life estate, which terminated on the death of Manuel Maria Gandara in 1878. It does not purport to be a

conveyance to Manuel Maria Gandara, but to his son, Miguel Gandara.

This instrument contains the recitals that the lands at that time belonged to the vendor, Francisco A. Aguilar, in full dominion, and the grantee "accepted this writing in all its parts," including the recital that the vendor had not theretofore sold, alienated or mortgaged the same. These recitals show that at this time Manuel M. Gandara did not claim to be the owner of said lands, but admitted that they were owned by Aguilar. If this instrument is a "deed," then appellees herein are estopped from asserting title under the instrument of 1856, and can claim under the instrument of 1869 only a life estate at the most. The recital in this instrument is a particular one as to the existence of a present fact, viz., that Aguilar, the grantor, then owned the lands in full dominion, as above stated, "not having sold, alienated or mortgaged the same," and the instrument containing these recitals is signed not only by the grantor but by the grantee, or by Miguel Gandara, as well. How the grantee in said instrument can claim that Aguilar did not then own the lands, after thus admitting that he did, and that he had theretofore sold and alienated the same by the instrument of 1856, after thus admitting that he had not done so, is not easy to perceive. The parties to the instrument agree for the purpose of the particular transaction, namely, "in order to carry out the said sale in due form of law," to state certain allegations as true, namely, that the full ownership of the lands was then in the grantor, and that so far as regards that transaction there shall be no question about such allegations. They bound themselves by contract that the facts should be as stated. This seems to fulfil every re-

quirement of an estoppel by recital. Calkins *v.* Copley, 29 Minn., 571; Horton *v.* Westminster Commissioners, 7 Ex., 780; Lainson *v.* Tremer, 1 Ad. & E. 792.

VII.

The lower court found as a fact on the question of adverse possession, as follows:

"That the defendants entered into a part of the premises in controversy at the date of their deed aforesaid, towit, September 21, 1881, and in the latter part of December, 1882, or in January, 1883, they placed a large number of cattle upon said lands, and have ever since used the same for pasturage of said cattle, and that the said property has been assessed to them in each year, since 1882, including that year, and the taxes paid thereon." (Record, p. 46.)

The payment of taxes is immaterial. The possession of a part of the land is not a possession of the whole, and does not set the statute in motion. If the statute begins to run at all, it begins from the date of the pasturage of cattle, in December, 1882. The complaint in this case was filed June 25th, 1887 (record, p. 2), before the expiration of five years, and the plaintiffs' rights are not barred by the statutes as given in full, *ante*, p. 17.

Moreover, if the instrument of 1869 conveyed only a life-estate, on the death of Gandara in 1878 such estate was determined, and defendants became tenants at sufferance who could not dispute the title of the grantor or set up a title by adverse use before disclaiming and surrendering the property.

Woods on Stat. Limitations, p. 554 (note), and cases cited.

1 Wash. Real Prop., *p. 393 and cases cited.

Conclusion.

We have endeavored to show that neither of the instruments under which defendants' claim conveyed the fee out of Aguilar, and we believe they will be so construed by this court. Defendants urged in the court below that even if this were true the instrument of 1869 would be good against the heirs of Aguilar as a contract to convey. Defendants seemed mainly to rely on this point. There can be no question as to the rule that in certain cases equity will relieve against mistake. But we submit that there was no mistake or omission in the instrument of 1869. The parties said exactly what they intended to say. They intended to get up an instrument good under the Mexican law, and did so, but the instrument is worthless under the laws of Arizona, for the reasons heretofore given. As was said by the court in Lies *v.* De Diablar, 12 Cal., 330: "No man has any vested right to dispose of any property by whatever title he holds it, in any way other than that which the law prescribes."

In Wadsworth *v.* Wendell, 5 John. C., 224, where the defect in the deed was the want of a seal, the instrument was held good in equity, because, as the court puts it, "the omission to affix a seal was a mere mistake, contrary to the intention of the parties, for the instrument concluded with these words: 'In witness whereof, I have hereunto set my hand and seal.'"

That is not this case, for it was not the intention of the parties to put any seal to the instrument of 1869.

In Higinbotham *v.* Burnett, 5 John. C., 184, though there were no technical words of inheritance required by law, a trust in fee was considered as

created under the charge in the bill and the special circumstances of the case. But we submit that such special circumstances do not exist in this case.

In Chamberlain *v.* Thompson, 10 Conn. 243, a conveyance in trust was made, but, by mistake of the scrivener, the words of inheritance were omitted. The court held that wherever an estate in fee is required in order to satisfy the purposes of the trust, such an estate will pass without the word heirs, and that the omission of words of limitation being entirely accidental, and owing to the mistake of the scrivener who drew the deed, a court of chancery would correct the mistake.

Neither of these holdings would apply to the case at bar. A strictly legal conveyance, under the laws of Mexico, was executed, and there was no omission by mistake of words of inheritance or of a seal. The most that can be said of it is that the parties were ignorant of the law.

As a contract to convey, the instrument of 1869 would be a contract to convey a life-estate only, because there are no words of inheritance.

The fact is, that the instruments of 1856 and 1869 were notarial acts, executed under the laws of Mexico, capable of passing the title under the laws of that country, but not sufficient to convey title under the laws of New Mexico or Arizona. This case seems to fall directly under the ruling in U. S. *v.* Crosby, 7 Cranch, 114, *supra*, and we submit that judgment should be entered for appellants on the findings of fact.

Respectfully submitted,

ROCHESTER FORD,

Attorney for Appellants.

148 U.S. 80
148 U.S. 80

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DOLORES G. ASTIAZARAN, JESUS A. DeOCEGUERA, FRANCISCO OCEGUERA, ET AL., APPELLANTS,

vs.

THE SANTA RITA LAND & MINING COMPANY, AND THE NEW MEXICO & ARIZONA RAILROAD COMPANY.

No. 43.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEES.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellees.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

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DOLORES G. ASTIAZARAN, JESUS A. DEOCEGUERA, FRANCISCO OCEGUERA, ET AL., APPELLANTS,

v.

THE SANTA RITA LAND & MINING COMPANY, AND THE NEW MEXICO & ARIZONA RAILROAD COMPANY.

No. 43.

BRIEF FOR APPELLEES.

STATEMENT.

This is an action brought by appellants on the assumed authority of the laws of Arizona Territory to quiet title to certain premises situate in Pima County, commonly known as the "Ranchos Tumacacori, Calabasas and Huevavi." Said premises were sold and granted by the Mexican Government on April 19, 1844, to Francisco Alexandro Aguilar, containing about 52,000 acres, and have thence passed by regular chain of conveyance into the ownership of the de-

fendant Land & Mining Company, the interest of the Railroad Company being acquired from it by condemnation proceedings to the extent of its right of way, station grounds, &c. The parties plaintiff are the alleged heirs-at-law of the original Mexican grantee, together with two additional parties to whom they conveyed years after the title of their ancestor had been duly passed to defendants and when, as this Record shows, such grantees took with full notice of both the record and of the facts attending such conveyance to defendants. The Brief for appellants (p. 35) admits that the deeds of conveyance from the Mexican grantee (Aguilar) were executed in full compliance with the laws of Mexico, and were amply sufficient to pass the title under such laws to the defendants. The sole contention is that because of assumed technical omission of a seal in such original conveyances, and equally technical objection in the form of transfer and mode of acknowledgment, they do not meet *strictissimo verbis* the requirements of the laws of New Mexico and Arizona which were operative thereover at the time of such conveyances, the premises being then situate in the country acquired by the United States from Mexico through the Gadsden purchase of 1853. Notwithstanding these conveyances, both in expression and clear intendment, conveyed all the estate of Aguilar in fee; notwithstanding their admitted sufficiency to accomplish this result under the laws of Mexico; notwithstanding that, from 1856 down to the commencement of this action in 1887, the heirs of Aguilar made no attempt to challenge these conveyances; notwithstanding full knowledge on the part of their alleged grantees, who acquired for nominal consideration a colorable interest in this property and for the purpose, fully disclosed by this Record, of initiating this lawsuit therefor; notwithstanding possession by the de-

fendants for a period exceeding the statute of limitations, and notwithstanding their payment of annual taxes thereon for many years, it is now asserted against us that these conveyances, executed in Mexico between residents and citizens of that country, complete in form under Mexican laws, duly signed by the grantor and acknowledged, may be avoided on the technical grounds above stated.

Under such circumstances, we respectfully submit this proceeding will not strike this Court with special favor. Indeed, we are fully convinced that the decree sought will not be granted unless imposed by plain duty, from which there is no proper mode of escape.

The complaint avers simply the original grant; the alleged title in fee of the plaintiffs thereunder; the defendants' consequent want of legal right or interest therein, and without further disclosing the nature or source of such title prays that the defendants be required to answer, and that decree may be entered, declaring (1) that the defendants have no rightful estate or interest in the property, "and that the title of complainants is good and "valid," "and (2) that the defendants be enjoined from "asserting any title or interest in the premises, and for "such other and further relief *as shall be meet and agree-* "*able to equity*, and for costs of suit" (Rec. 1, 2).

Thereto the defendants filed demurrer (Rec. 3, 5), (1) for insufficiency of the complaint in law, and (2) for insufficiency in form "in this that the plaintiffs' title is not exhibited," &c. Pleas were filed denying the claimed ownership of plaintiffs; averring the ownership in fee of the defendants, and pleading the statute of limitations. Thereafter amendment was filed to the original answers setting forth the chain of title under which defendants claim, culminating in deed to the Santa Rita Land & Mining Company, dated September 21, 1881, "and have ever since

" that day been in open and notorious possession thereof, " claiming title thereto." This allegation of possession is fully supported by finding XXII (Rec. 46). The statutory period of limitation in Arizona is five years (Comp. Laws of Arizona, 1877, Sec. 5, p. 357), which terminated here on September 21, 1886. This complaint was filed June 25, 1887.

Full findings of fact were made by the trial court and the trial of the case (jury being waived) resulted in judgment for the defendants (Rec. 6), which on appeal resulted in the opinion of that Court affirming the judgment below (Rec. 56), although no formal judgment of the Supreme Court of Arizona appears by this Record to have been entered in that Court.

The findings of the trial court were adopted as the findings of fact in the Supreme Court of Arizona (Rec. 60), same being set forth at length, with a translation of the original title papers and certain conveyances thereunder on which the title of the defendant rests, together with deeds recently executed by the alleged heirs of the original Mexican grantee, under which some of the plaintiffs now make claim to the legal title, together with the alleged heirs-at-law of Aguilar, such original Mexican grantee.

Therefrom the original title to the premises appears as follows: That, pursuant to a petition therefor by the natives of the Indian Pueblo "Tumacacori," the necessary examination, measurement, and report thereon, formal grant was made of these premises to the "said natives, " their children, heirs, and successors," by the political and military governor of the provinces of Sonora and Sinaloa on April 2, 1807 (Rec. 7, 22). The condition of this grant (Rec. 21) was *inter alia* that upon total abandonment of the premises for the space of three years

"they may be granted to any person who may demand "them."

In 1844 the Treasury Department of Sonora sold the same land at public auction to Don Francisco Aljandro Aguilar, in recited conformity with certain laws and decrees and by deed of such Departmental Treasurer to Aguilar dated April 19, 1844 (Rec. 23, 26), setting forth the proceeding at length and declaring the sale to Aguilar of said land "for himself, his children, his heirs, and succes- "sors," &c., under prescribed conditions of occupation and subjection to redenouncement and sale by the National Treasury on entire abandonment of the premises for specified period.

On March 31, 1856, Aguilar sold and transferred his title to the said premises to Manuel Maria Gandara by an instrument set forth in the X finding of fact as follows (Rec. 33, 34):

"X.

"It is admitted that the following documents were "signed at the time and place and by the persons when, "where, and by whom they purport to have been signed.

"PORT OF GUAYMAS, *March* 31, 1856.

"Before me, Pedro de Valois, judge of the 2d inst. of "the district, appeared to-day Mr. D. Francisco A. Aguilar, of this city, exhibiting the present title, consisting "of thirty-nine written sheets, which proves his right, "acquired legally and legitimately, to the lands and which "therein are expressed, which he has made over to Mr. "Manuel Maria Gandara, with the same rights and con- "cessions that he himself had received from the General "Treasury of the State that he may have power as abso- "lute owner and proprietor thereof to dispose of them "as might best suit his convenience or interests.

"Thus I certify that he executed the document and "signed it in my presence and that of the witnesses.

"P. DE VALOIS.
"F. A. AGUILAR.

"Witnesses;
"QUIRINO ROSAS.
"LORENZO POMPA.
"JESUS GONZALES MENESES,
"National and Public Secretary (Notary), resident "of this city.

"I certify with all the power of law that the signature "with which is provided the foregoing deed of transfer, "and which is 'P. de Valois,' is the signature of said "judge, who at the time was the judge of the 1st instance "of Guaymas, as he states, and that it is the same signa- "ture which he habitually uses in all his business, public "and private, and that as such it is to be considered of "good faith and credit in judicial business and otherwise.

"In witness whereof, I thus certify and sign this cer- "tificate, in the City of Hermosillo, State of Sonora, in "the Republic of Mexico, on the tenth day of October, "one thousand eight hundred and sixty-one.

"JESUS MENESES.

[RUBRICA.] E. N'ly P.
(National and Public Notary.)

"The said document is endorsed upon a copy of the "'expediente,' written upon 39 sheets of official paper, "with the seal of the years 1856 7 engraved and the seal "of the Republic of Mexico stamped on each sheet, and "which is certified as follows:

"It (this copy) agrees with its originals, which are in "the possession of Don Manuel Maria Gandara, at whose "request this copy has been made on these thirty-nine "sheets with the proper seal, and I authorize the same, "signing with my assisting witnesses.

"RAMON T. CUEN.

"Witness: J. GABRIEL SALCIDO.
"Witness: JESUS P. FURTEL.
"Lic. Jose de Aguilar, Governor of Sonora.

"I certify that the signature which precedes of Ramon "T. Cuen, judge of the first instance of civil matters of "the district of Ures, is that which he uses and employs "in all his official acts.

"In witness whereof I give these presents at Ures, this "27th day of March, 1858.

"JOSE AGUILAR.

"Government of Sonora.

"The original document, of which the foregoing is a "translation, was produced on the trial by the Surveyor-"General of Arizona, and is endorsed 'Filed in the Sur-"'veyor-General's office, June 9, 1864. Levi Bashford, "'Surveyor-General.'"

In 1869 a further conveyance from Aguilar to Gandara was made, which is set forth in the XI finding as follows (Rec. 34, 35):

"XI.

"*Deed from Aguilar to Gandara.*

"(1869.)

"In the city of Guaymas of Zoragoza, on the second day "of the month of March, 1869, before me, Jose Busta-"mente, judge of first instance of the district, the ordinary "assisting witnesses, with whom I act for want of a notary "public, and the instrumental witnesses, who will be men-"tioned at the end of this instrument, appeared Don Fran-"cisco A. Aguilar and Don Miguel Gandara, in represen-"tation of his father, Don Manuel Gandara, as shown by "the general power executed in his favor in the city of "San Luis Potosi on the 28th of January, 1868, before the "notary, Don Isadora Cobrello, which power I certify that "I have seen, and the first having proved himself to be "solvent with the pueblo (public) treasury and registered "in the registry of the national guard, as shown by the "certificates presented, which I also certify that I have "seen, both of lawful age, the first a resident of this city,

" and the second of Ures, who said that consulting their
" mutual interests that they agreed in the sale of the lands
" called Tumacacori, Calabasas, and Huebabi, situated in
" the Territory of Arizona, belonging to the United States,
" which lands belong to the vendor by virtue of a title of
" sale, transfer, and adjudication in his favor by the treasury
" of the department of Sonora in the year 1844, all of
" which is based on a primitive title issued in 1807 for the
" said lands to the natives of Tumacacori as a fundo legal
" of their pueblo and estancia (stock rancho) for the same,
" by virtue of which they being in full dominion to the said
" Don Francisco A. Aguilar; and, in order to carry out the
" said sale in due form of law, the said Don Francisco de-
" clares that he gives, as sale to Don Miguel Gandara, in
" representation of his father, Don Manuel Maria Gandara,
" said lands, declaring that he has not sold, alienated, or
" mortgaged the same; that they are clear of all responsi-
" bility and encumbrances; as such he sells the same, with
" all their uses and servitudes and all things thereto an-
" nexed that they have had or have pertaining thereto,
" according to law, for the sum of $499, which they
" have secured to their entire satisfaction, and the said
" sum being paid and satisfied, he executed in favor of
" Don Miguel Gandara, in representation of his father, Don
" Manuel Maria Gandara, the receipt. He also declares
" that the said amount of $499 is the just and true value
" of said lands, the ownership and dominion of which he
" renounces, cedes, and transfers in favor of the repre-
" sentative of Senor Gandara, so that he may dispose
" of the same as a thing belonging to him, acquired by
" just and legal title, and that he may take the possession
" that of right belongs to him; and since the delivery of
" the money does not appear, he renounces the law 9, title
" I, partida 5, and finally he obligates himself for the se-
" curity of this place; and in the same act Don Miguel
" Gandara, to whom I certify the title referred to was de-
" livered, as also the accompanying map, in representa-
" tion of his father, Don Manuel Maria Gandara, said that
" he accepted this writing in all its parts, both parties ob-
" ligating themselves to the fulfilment of what is set forth

" in the same, with all their property, present and future,
" declaring that there is no fraud or deceit in the matter,
" and if there should be, in large or small amount, they
" make of the same mutual donation, final and irrevocable,
" renouncing all right of action and the time allowed by
" law for commencing the same. Thus they said and
" signed, being advised that this document was to be reg-
" istered in the office of mortgages within the term of
" eight days, the taxes being personally paid into the
" public treasury under the penalty of the nullity of this
" instrument if the same should not be done.

" The citizens, Angel Rodrigues, Juan Encinas, and
" Rafael S. Canez, who are present. Having witnessed
" which I attest.

" FRANCISCO A. AGUILAR.
" MIGUEL GANDARA.

" Instrumental w's : ANGEL RODRIGUES.
" Instrumental w's : JUAN ENCINAS.
" Instrumental w's : RAFAEL CANEZ.
" Before me : JOSE BUSTAMENTE.
" Assistant : CHARLES R. VALENZUELA.
" Assistant : EDWARDO MORALES.

" March 3d, 1869, the sum of $24 95, the corresponding
" tax of five per cent. on the sum of $499 for the transfer
" of dominion, as set forth in the foregoing deed, has been
" paid by Don Miguel Gandara in representation of his
" father, Don Manuel Maria Gandara, with the corre-
" sponding impost of 25 per cent. Federal tax.

" GUAYMAS, *March* —, 1869.

" This deed remains registered in folio 2, verso, and 3
" front of the respective book ; all of which I authorized
" and signed with the assisting witnesses.

" JOSE BUSTAMENTE. [SEAL.]

" Assistants :

" CARLOS R. VALENZUELA.
" JOSE MARIA VIZCANO.

"The original document, of which the foregoing is a "correct translation, was produced at the trial by the "surveyor-general of Arizona, and is endorsed:

"Filed Dec. 22d, 1879. John Wasson, surveyor-general.

"The said deed was recorded in the office of the county "recorder of the county of Pima, Territory of Arizona, on "the 20th day of July, 1869."

By the XII, XIII, and XIV findings (Rec. 36) conveyances are recited, the validity of which are not in question, as expressly admitted by appellants' brief (p. 8), to wit:

1st. Deed dated July 24, 1877, recorded January 27, 1879, from Gandara to C. H. Sykes, in fee.

2d. Deed dated November 26, 1878; and recorded the same day, from Sykes to John Curry, conveying an undivided interest in fee.

3d. Deed dated December 18, 1879, recorded February 5, 1880, from Sykes and Curry to the Calabasas Land and Mining Company, in fee.

4th. Deed dated September 21, 1881, recorded same day, from the Calabasas Land and Mining Company to the Santa Rita Land and Mining Company, in fee.

To the introduction of the deed executed on March 31, 1856, from Aguilar to Gandara, the plaintiffs excepted for reasons set forth at length on page 51 of the Record. The subsequent deed of 1869, from Aguilar to Gandara, was not excepted to by these plaintiffs so far as disclosed by this Record. And the admission of this deed of 1869 without objection is emphasized by their assignment of errors in the Supreme Court of Arizona (Rec. 54), wherein error is alleged only in admitting the deed of 1856 and without any reference to the deed of 1869.

From this recital of facts it will be seen that title had fully vested in the Santa Rita Land and Mining Company on September 21, 1881. But findings IV, V, VI, and VII

(Rec. 29–31) show deeds from the alleged heirs of Aguilar to one Santiago Ainsa, of Tucson, Arizona, bearing date in April and May, 1887, each for the nominal consideration of $100, and each conveying eleven-twentieths ($\frac{11}{20}$) of the several grantors' alleged interest "in and to all "lands, real property, and estate in the said County of " Pima, Territory of Arizona, United States of America," and without further description.

The III finding (Rec. 29) declares that Francisco Occeguera, one of the plaintiffs herein, "testified that he trans- " ferred eleven-twentieths ($\frac{11}{20}$) of his interest of the prop- " erty in question to Santiago Ainsa for the nominal " consideration of $1.00, and authorized him to sue for " said property; that he did not know who was paying " the expenses."

The XXIV finding of fact recites (Rec. 46):

" That Santiago Ainsa is a resident of Tucson and a " member of the bar of Pima county.

" And that he has resided at Tucson, in the Territory of " Arizona, for the past eleven years; is a native of Sonora, " Mexico; knew the land in controversy many years; " knew of the grant for 30 to 40 years; first knew that " Gandara claimed the grant about eleven years ago; knew " eleven years ago that the grant had been sold to Sykes " and others; knew the condition of the record as it ap- " pears in the recorder's office at Tucson 11 years ago; " did not tell the plaintiffs in this case of the supposed " defects in defendants' title, but told them he thought " they had an interest in Arizona and they wanted him to " move in the matter; told them shortly before they exe- " cuted the deeds to him; was acting in the matter simply " for himself. When the heirs of Aguilar executed the " deeds to him they did not know what they were convey- " ing. He told them they had an interest in Arizona, and " they gave him one-half interest if he would bring suit " for them and himself; told them three or four months

" afterwards what the interest was ; had known that the " grant was claimed by the defendants soon after he came " to Tucson and has known it ever since ; knew Mr. Wil- " liams, their agent ; did not know Mr. Towne, their pres- " ent agent ; knew that the defendant had large improve- " ment in the way of building upon the grant, and by " reputation that they had a large number of cattle pas- " turing thereon ; knew this when he went to Mexico to " get these deeds ; had never had notice of the instrument " of 1856 until a few days ago ; knew that the original " claim had been filed with the surveyor-general, but " never had examined it ; had never examined the papers " in the surveyor-general's office and did not know that " Manuel Gandara had made application to surveyor-gen- " eral's office."

The IX finding of fact (Rec. 31) recites further a conveyance from Ainsa to one Frank Ely for a consideration of $10 cash, and the performance by Ely " of certain con- " ditions and trusts to be hereafter set forth and fully " stated in a declaration of trust to be made and executed " by said Ely, and conveying to the latter an undivided five-forty-eighths ($\frac{5}{48}$) interest in his own right and in trust for the remainder of the grantor's (Ainsa's) interest in all lands in Pima County, Arizona, conveyed to Ainsa by the alleged heirs of Aguilar through the recited conveyance, *supra*, and without further description. The trust instrument does not appear of record, but this finding concludes with the statement that—

" It was stipulated that the trust mentioned in the last " deed was as to $\frac{4}{48}$ for Ainsa and the remainder for Roch- " ester Ford and L. M. Jacobs."

The XVIII and XIX findings of fact (Rec. 38–42) contain in full the petition of Gandara to the Surveyor-General and of Sykes and Curry, his grantees, praying con-

firmation of the claim, and the XXI finding (Rec. 44) contains the opinion and recommendation of the Surveyor-General dated January 7, 1880, recommending confirmation to the claimants, Sykes and Curry. The petition of Gandara was filed on June 9, 1864, and of his grantees, Curry and Sykes, on December 15, 1879, and the introduction of the petition by Gandara and the report of the Surveyor-General recommending confirmation of the grant to Sykes and Curry were excepted to by appellants as incompetent, &c. The petition by Sykes and Curry with its recital of conveyance from Aguilar to Gandara, and from the latter to the petitioners, Sykes and Curry, whereon they claim an absolute title in fee, was not objected to by plaintiffs so far as shown by this Record, nor was its introduction in evidence assigned for error before the Supreme Court of Arizona (Rec. 54) nor here.

The opinion of the Court below is set out in the Record (pages 56–60).

The conclusion of the Court adverse to the plaintiffs is therein rested upon two grounds:

1st. "Because the Court had no jurisdiction," and

2d. "If it had, the complaint did not state sufficient to "constitute a cause of action in equity and justified no "relief in equity."

ARGUMENT.

I.

No Final Decree.

This Record does not disclose *any* formal decree rendered by the Supreme Court of Arizona in this case. The opinion of that Court concludes with the usual order of affirmance (Rec. 60), and nothing more.

The Rev. Statutes of Arizona of 1887, Sec. 950, pp. 197 and 198, provides as follows:

"Whenever the Supreme Court on the trial of a cause "brought from any inferior court shall affirm the judg- "ment or decree of such inferior court, or when said court "shall proceed to render such judgment or decree as "should have been rendered by the Court below, and such "judgment shall for the same or a greater amount, or of "the same nature as rendered in the Court below, said "Court shall render judgment against the appellant or "plaintiff in error, and his sureties on the appeal bond, *a* "*copy of which shall always accompany the transcript of* "*the record;* and said Supreme Court shall, in their dis- "cretion, also include in their judgment or decree such "damages, not exceeding ten per cent. on the amount of "the original judgment as the Court may deem proper; "and the judgment or decree of said Court rendered as "contemplated in this section shall be final."

We submit, therefore, that there is no final decree of that Court shown by this Record, and hence the pending appeal should be dismissed.

II.

Jurisdiction.

Plaintiffs aver ownership *in fee*, depending primarily upon the recited sale and grant to Aguilar by the former Government. The Court below declares its entire want of jurisdiction over the *title* herein upon the ground that Congress has not imposed such power in any judicial tribunal. Commenting thereon, it observes:

"Beyond question the various acts of Congress creating "particular tribunals, with power in the first instance to "carry into effect the provisions of the treaty of Guada-

" lupe Hidalgo and the Gadsden purchase relating thereto " conferred upon those particular tribunals, within their " respective territorial jurisdictions, exclusive power to de- " termine primarily all questions touching land grants " under the laws of Spain and Mexico.

" This whole subject originally belongs to the political " branch of the Government; over it Congress has abso- " lute dominion, and no court or tribunal had any jurisdic- " tion over matters pertaining thereto, except such as Con- " gress has by act designated and then only to the extent " to which it has conferred jurisdiction."

Considering the objection made in argument that the Surveyor-General exceeded his authority in recommending confirmation of this claim to Sykes and Curry, the admitted grantors of the defendants, and through whom they deraign title, the Court declares:

" If so, should not his claim be established before the " Congress of the United States, and thus prevent Con- " gressional action confirming that report? If he ex- " ceeded his authority would that justify the courts' inter- " ference? But we cannot see that the Surveyor-General " in this case exceeded his statutory authority. Should " the Court have passed upon these mesne conveyances, " and thus determined who had properly derived title un- " der the original grant from the elder Aguilar? Could " the Court determine whether any title descended or had " been acquired from him without first determining " whether he himself had any title? Would it not thus " be incumbent upon the Court to determine the validity " of the original grant? Can the stream rise above its " original source; or, rather, will not the source largely " determine the character of the waters? And will not " the original source of the title in a great measure char- " acterize all deraignments under it? Hence we say the " courts cannot act until Congress acts upon the Surveyor- " General's report. Until then it is not subject to review " in any forum. If this be so, the Court below had no

" jurisdiction, and rightly dismissed the bill. See John-
" son *v.* Towsly, 12 Wall. 72; Tameling *v.* Emigration
" Co., 93 U. S. 661; Maxwell Land Grant case, 121 U. S.
" 325; Whitney *v.* McAfee, Supreme Court of New Mex-
" ico, 1st West Coast Rep. 162."

Herein the Court applies the doctrine of *Tameling* v. *U. S. Freehold, &c., Co., supra*. Therein this Court reaffirms its repeated ruling that, while the treaty stipulated for the full protection of rights of property existing at the date of transfer of sovereignty, yet—

" The duty of providing the mode of securing them and
" fulfilling the obligations which the treaty of cession im-
" posed was within the appropriate province of the polit-
" ical department of the Government."

After reciting the judicial procedure prescribed by the Act of March 3, 1851, for the settlement of such titles in California, and the proceeding before the Surveyors-General of Arizona and New Mexico, by the Acts of July 22, 1854 (10 Stats. 308), and July 15, 1870, the Court in the case cited declares—

" It will thus be seen that the modes for the determina-
" tion of land claims of Spanish or Mexican origin were
" radically different. Where they embraced lands in Cali-
" fornia, a procedure, essentially judicial in its character,
" was provided, with the right of ultimate appeal by either
" the claimant or the United States to this Court. No
" jurisdiction over such claims in New Mexico was con-
" ferred upon the courts, but the Surveyor-General in the
" exercise of the authority with which he was invested
" decides them in the first instance. The final action on
" each claim reserved to Congress is of course conclusive,
" and therefore not subject to review in this or any other
" forum."

The same doctrine is reaffirmed in the *Maxwell Land Grant case* (121 U. S. 325, 365.)

But the recent Act of March 3, 1891 (26 Stats. p. 854), creating the Court of Private Land Claims sets at rest all questions of jurisdiction here presented. Thereby a special tribunal is created for the hearing and determination of all questions of title both as between the United States and the claimant and *inter partes*. By Section 6 thereof all claims are to be presented to this tribunal which "have "not been confirmed by act of Congress or otherwise "finally decided upon by lawful authority and which are "not already complete and perfect," etc. The petition for confirmation is required to set forth fully the nature, date, and form of the grant claimed; to name all persons in possession of or otherwise claiming the land or any part thereof; the former action or non-action of Congress thereon, and whether such claim "has been heretofore sub-"mitted to any authorities constituted by law for the ad-"justment of land titles within the limits of the said terri-"tory so acquired," and the nature of the action of such authorities thereon. By Section 7 such Court is given ful' power and authority to hear and determine all questions arising "in cases before it relative to the title to the land, "the subject of such case, the extent, location, and bound-"aries thereof, and other matters connected therewith "and fit and proper to be heard and determined, and by "a final decree to settle and determine all questions of "the validity of the title and the boundaries of the grant "or claim presented for adjudication according to the law "of nations" and stipulations of the treaties with Mexico; the laws and ordinances of the Government from which the claim is derived, "and all other questions properly "arising between the claimants or other parties in the "case and the United States." The elaborate details of

procedure, hearing, appeals, survey, patent, etc., etc., disclose the full purpose of Congress to provide a judicial proceeding and tribunal wherein rights against the United States and *inter partes* may be heard, adjudicated, and finally determined. By Section 12, failure to present petition for confirmation within two years creates an abandonment and complete bar, and the Court is therein authorized to appoint guardians and counsel for infants or other persons under disability, for the protection of their rights.

Whilst the proceeding is primarily intended to settle these claims as against the United States, their determination and confirmation of title *in the right party* is plainly intended.

But the contention *contra* is that the grant here in question "is a perfect or complete title and needs no confirmation." This is mere assumption. The plaintiffs plead that the lands in question were sold and granted by the Mexican Government to Aguilar on April 19, 1844; the answer admits this averment, and finding 1 (Rec. 7) recites this allegation of the complaint and admission of the answer.

But these averments *inter partes* cannot create a jurisdiction in the court below which is otherwise wanting and by the legislation *supra* exclusively vested in another tribunal. The assumption of a perfect grant indulged by opposing counsel assumes that the sale and conveyance by the Mexican Government to Aguilar is complete by reason of the recitals in the deed of the Departmental Treasurer to Aguilar (Rec. 23) which sets forth that it is done in accordance with recited decrees and laws of that Government. These foreign laws are not set out in this record nor proven as a fact herein. Whether the sale was in conformity thereto is therefore a matter upon which,

on the record here presented, the argument of a complete grant cannot be found.

It is true that this Court in *Ely* v. *New Mexico R.R. Co.* (129 U. S. 291) sustained a complaint similar in form to that appearing in the case at bar as sufficient in statement to constitute a cause of action under the Arizona statute. It is also true that neither in the record of that case, nor in the briefs, nor in the decision in this Court, nor below, was the question of *jurisdiction* here presented considered or discussed. Inspection of the record of that case will show that the single question considered and decided both in this Court and the Supreme Court of Arizona related solely to the sufficiency of the complaint as setting forth a cause of action. Conceding full effect to the Court's decision therein upon the sole question there raised and decided, we submit it does not touch nor affect the primary question of jurisdiction here presented.

The complaint in the case cited averred a "patent" to the land in controversy obtained from the Spanish Government. In the case at bar it is expressly admitted (Rec. 46) that "no final action had been taken by Con-"gress" upon the Surveyor-General's recommendation for confirmation.

Equally inapplicable are the citations from decisions of this Court under the California Private Land Claim Act of 1851, holding that the proceeding there provided was solely to segregate the public domain from the private land claims and titles originating under the former Government, and involved no questions of deraignment of title thereunder *inter partes*. All of such decisions stand under the plain provisions of the Act of 1851, which clearly expressed this sole and dominant intention. But the jurisdiction created for California under immediate legislative direction following closely upon the Treaty of 1848,

and under which that territory was acquired, does not control the legislative policy and will with respect to fulfilment of treaty obligations under the Gadsden purchase. *That* was controlled solely through the investigation and report of the Surveyors-General, and the resulting action or non-action of Congress on claims so reported to it until after a lapse of nearly forty years Congress has provided a *special* tribunal to hear and determine, not only as against the United States, but conflicting titles *inter partes*. Its power so to do is fully affirmed in *Botiller* v. *Dominguez* (130 U. S., at p. 250), and its exercise of such power by its recent enactment is beyond question. Having thus provided, it is manifest the tribunal thus created has exclusive original jurisdiction over the subject and no other judicial tribunal before or since (prior to confirmation) has been invested therewith.

After confirmation, disputes upon titles *inter partes* would not be subject to this exclusive jurisdiction and procedure. Fulfilment of treaty obligations by this Government confers the power and corresponding duty to determine not only the validity of the claim, but the true deraignment of title thereunder, in the protection of those rights of property, guaranteed by the treaty of cession.

Article V of the treaty of 1853—Gadsen purchase—under which this territory was acquired by the United States (10 Stats., p. 1035) incorporates by express reference Article VIII of the Treaty of Guadalupe Hidalgo, of 1848 (9 Stats., pp. 922, 929), which provides:

"In the said Territories, property of every kind now "belonging to Mexicans not established there shall be "inviolably respected. The present owners, the heirs of "these, and all Mexicans who may *hereafter acquire said* "*property by contract*, shall enjoy with respect to it guar- "anties equally ample as if the same belonged to citizens "of the United States."

III.

THE MERITS.

As recited, *supra*, the title of defendants is challenged by the heirs of the Mexican grantee (Aguilar) and by those who had acquired alleged interest with them to conduct this lawsuit, solely on the grounds that the deeds of 1856 and 1869 from Aguilar to Gandara do not meet the assumed requirements of the Territorial law. Denying such contention to be true, we again ask the Court's primary consideration of the following provision found in the Treaty of Guadalupe Hidalgo, of 1848, Article VIII (9 Stats., pp. 922, 929), cited *supra*, viz :

> " In the said Territories, property of every kind now " belonging to Mexicans not established there shall be " inviolably respected. The present owners, the heirs of " these, and all Mexicans who may hereafter acquire said " property by contract, shall enjoy with respect to it guar- " anties equally ample as if the same belonged to citizens " of the United States."

All the provisions of this Article VIII of this treaty are incorporated by express reference into the later treaty of 1853—the Gadsen Purchase (10 Stats., p. 1035, Article V).

In 1856 and in 1869 both Aguilar, grantor, and Gandara, his grantee, were residents of Mexico. Both the 1856 deed and the latter conveyance of 1869 are admitted to be perfect instruments of conveyance under Mexican law. In view of this treaty guarantee, *supra*, even if assumed defects for non-compliance with American law be found therein, how should the instument be construed? And when parties assert defects therein who are privies

in blood with the grantee, and *now* Mexican citizens, or others who took with admitted full knowledge of the facts, and to speculate upon this title, can they be justly heard to apply *other* rules of conveyance than their ancestor understood and followed? There is no one here claiming by purchase in good faith or for value. No possible *equities* superior to those of defendants exist. It is simply a bold attempt to speculate upon a title which has stood unquestioned from 1856 to 1887, passed from hand to hand with increasing values, added by the labors and investments of these defendants, and the attempt is made by mere *volunteers*.

We submit the plain answer must be in accord with the treaty guarantee and intent, and in support of the title made by these conveyances.

But assuming the rule otherwise let us test the instruments of 1856 and 1869 by then existing Territorial law.

The conveyance of 1856 was made upon the back of a certified copy of the expediente of the grant. The certificate shows (Rec. 34) that it came from Gandara's possession. It was made before the District Judge who certifies to the signature of Aguilar thereto. It is further attested by three witnesses. The authority and signature of the judge is certified by the national and public notary under his official seal. The instrument declares Aguilar's intention to make over to Gandara these lands acquired by the former, "*with the same rights and concessions that he* "*himself had received from the general treasury of the* "*State*, that he may *have power, as absolute owner and* "*proprietor thereof*, to dispose of them as might best suit "his convenience or interests" (Rec. 33).

Aguilar's deed from the departmental treasurer (Rec. 25) ran to "himself, his children, his heirs, and successors." What further language could be used to express convey-

ance of the fee? The recitals in the 1856 instrument made on the back of an authenticated copy of the State's deed to Aguilar, incorporated the latter therein in plain and necessary intendment. Aguilar received an estate in fee; he conveyed *all* he had received to Gandara.

The petition of Gandara filed with the Surveyor-General June 9, 1864 (Finding XVIII, Rec. 38) recites that Aguilar purchased for his (Gandara's) benefit, by his direction and with his money, because of his absence from home at the time of the public sale of the property by the State. He further alleges that he (Gandara) took possession of the land, stocked it with cattle, rebuilt and improved the abandoned Pueblo, spending $32,000 therefor, and remained in possession by himself and tenants until 1862, when the Apache Indians finally killed the remaining tenants, and even since an American, renter from petitioner, met with like fate, "and up to the present time it "has been almost impossible to settle upon and occupy "said land continuously."

The petition further recites the transfer by Aguilar of his nominal right to Gandara by the conveyance of 1856.

Plaintiffs strenuously objected to the introduction of this petition in evidence here, yet they do not challenge its statements with counter proof. It has remained of record in the Surveyor-General's office *thirty-eight* years open to their attack, and not one word to challenge its truth has been uttered by a human being. What value does it possess, speaking at a time when, if its averments of fact were false, the testimony to prove or disprove its assertions was existing, and which no one has never yet appeared to deny? We submit it is part of the *res gestæ*, admissible in conscience and in law and presents now high proof of all it alleges against a mere technical objection in matters of form.

Its attestation by the signature of W. Claude Jones, as attorney for Gandara, is challenged as done without proven authority, ignoring the XVII finding (Rec. 37), which sets forth at length a deed from Gandara to Jones of a portion of the property for the expressed consideration of professional services to be rendered by the latter in obtaining confirmation of the grant. While such deed is neither acknowledged nor recorded, and inoperative as a conveyance, it is all sufficient to establish the full authority of Jones to act and to present this petition on his client's behalf.

Test the conveyance of 1869 from Aguilar to Gandara in the same way. It is signed by the grantor, acknowledged before the District Judge, witnessed by five witnesses, and duly registered. It expresses a money consideration, "cedes and transfers" the land, and has remained of record in Pima county since 1869. No one has ever *denied* its execution; the plaintiffs here fully admit it. It was received through Gandara's son, under full power set out in finding XXV (Rec. 47).

But the objection is made that neither the deed of 1856 nor 1869 had a *seal* attached to the grantor's signature.

But the law of New Mexico in force in 1856 (when the land was part of that Territory) as given by appellants' brief does not call for a seal. Its language is (p. 17):

"SEC. 4. All conveyances of real estate shall be *sub-*
"*scribed* to by the person transferring his title or interest
"in said real estate, or by his legal agent or attorney."

Prior to the conveyance of 1869 from Aguilar to Gandara, the Territory of Arizona had been created. Its conveyance act of 1864, and statute of the same year adopting the common law of England, &c., as the rule of decision as given on page 20 of appellants' brief, and which continued

without change down to the compilation of 1871, is identical with the law of California of 1850 on the same subjects. (Laws of 1850, 1853, California, p. 513, p. 186.)

The law of Arizona (sec. 36) was an adoption of the California law also (*ibid.*, p. 518) that,

"The term 'conveyance' as used in this act shall be "construed to embrace every instrument in writing by "which any real estate or interest in real estate is cre-"ated," &c.

Under the California Statute, in *Stanley* v. *Green* (12 Cal. 166), Mr. Justice Field said:

"The objection to the want of a seal to the conveyance "to Fallon is not tenable. No seal was requisite under "the civil law. Any instrument which contained the "names of the parties, a designation or description of the "property sold, the date of the transfer, and the price "paid, was sufficient to pass the title."

In *Ingoldsby* v. *Juan* (*Ibid.*, 577) the same Court held:

"We know of no authority which holds that a convey-"ance of interest in land must necessarily be under seal; "and if it were so at common law it does not follow that "it is so required by our statute."

And the California Statute was identical with that of Arizona, by which Territory it was thus bodily adopted.

It is objected that the 1856 instrument is acknowledged before a judge without a seal, but his identity, authority, and signature are certified by the National and Public Notary under official seal. Again, it is urged that no acknowledgment appears thereon. *Per contra*, the judge certifies to Aguilar's identity and appearance before him, and in the body of the instrument he states: "Thus I

" certify that *he* executed the document and signed it in " my presence and that of the witnesses."

In *Carpenter* v. *Dexter* (8 Wall. 513, 527) this Court held that the certificate of the justice that the grantor personally appeared before him was sufficient identification, and "An affirmation, in the words of the statute, could not " more clearly express the identity of the grantor with the " party making the acknowledgment."

And the Court, in the case cited, further observes (p. 526):

" It is the policy of the law to uphold certificates when " substance is found, and not to suffer conveyances, or the " proof of them, to be defeated by technical or unsub- " stantial objections."

It is objected that the 1856 instrument contains no description of any real property. It was made and " endorsed " upon a copy of the original " expediente " or title papers, which are judicially certified as such and the signature of the certifying judge is attested by the certificate of the Governor of Sonora. Its recitals are unmistakable that it embraces and transfers to Gandara " the " lands and which therein are expressed."

Again, it is claimed that the 1856 instrument is but a power of attorney from Aguilar to Gandara. Yet in terms the instrument declares the transfer of the lands to Gandara " with the same rights and concessions that he " (Aguilar) " himself had received from the general treasury of the " State that he may have power *as absolute owner and pro-* " *prietor* thereof to dispose of them as might best suit his " convenience or interests."

The deed from the Departmental Treasurer conveys the land to Aguilar " for himself, his children, his heirs, and successors " (Rec. 25), and Aguilar transfers to Gandara

by this 1856 instrument with the "same rights and con-"cessions" he had received thereunder. This conveyed an estate in fee both in expression and intendment beyond all question.

It is finally urged that no *delivery* of the 1856 instrument to Gandara is shown. Finding X (Rec. 33, 34) expressly recites that the 1856 instrument is endorsed upon a copy of the "expediente" written upon 39 sheets of official paper with the seal of the years 1856–'57 engraved and the seal of the Republic of Mexico stamped on each sheet and which is certified as follows by the civil judge:

"It (this copy) agrees with its originals, *which are in* "*the possession of Don Manuel Gandara*, at whose request "this copy has been made on these thirty-nine sheets with "the proper seal, and I authorize the same, signing with "my assisting witnesses."

Finding X concludes with the statement that this 1856 instrument was produced on the trial by the Surveyor-General of Arizona, and is endorsed: "Filed in Surveyor-"General's office, June 9, 1864. Levi Bushford, Surveyor-"General."

The petition of Gandara for confirmation of the grant is endorsed (Rec. 42): "Filed June 9, 1864. Levi Bashford, "Surveyor-General." This 1856 document was filed on the same date and is described in the petition (Rec. 41), which states that the original "is herewith shown and made a "part of this petition."

This case was tried in February, 1888 (Rec. 5). The 1856 document was then more than thirty years old—it came from Gandara's custody in 1864, when filed with the Surveyor-General, and was produced by the latter upon the trial. It fulfils all the conditions of the rule of evidence whereby as an ancient document it proves

itself. (Greenleaf on Evidence, Vol. 1, Secs. 21 and 570.) Indeed the X finding, wherein it is set out at length, begins with the statement (Rec. 33):

"It is admitted that the following documents were "signed at the time and place and by the persons when, "where, and by whom they purport to have been signed."

The X finding sets forth at length the 1869 conveyance from Aguilar to Gandara, and its execution is admitted by the stipulation, *supra*. The assignment of errors by appellants' counsel (Brief, p. 10) asserts that the 1869 instrument conveyed a life estate to Gandara, who died in 1878, and hence the heirs of Aguilar and their grantees "are the owners of the reversion." Whilst in subsequent argument counsel urge the same objections made against the 1856 instrument, it must be remembered that the introduction of the 1869 deed was not objected to at the trial, nor made part of the bill of exceptions, nor assigned for error here or in the Court below. The argument denying *any* validity to the instrument contradicts the express admission of a life estate created thereby, *supra*.

But the 1869 conveyance does, in terms, fulfil all the conditions of a valid and sufficient deed transferring the fee—

a. In parties.

b. In expressed consideration, with acknowledgment of its receipt.

c. In description of the property conveyed.

d. "The *ownership* and *dominion* of which he *renounces*, "*cedes*, and *transfers*" to Gandara, "so that he may *dispose* "of the same as a thing *belonging to him*, acquired by *just* "*and legal title*, and that he may take the possession that "of right belongs to him."

e. The identity of the grantor and his execution, acknowledgment, and delivery of the instrument.

f. Its recordation in Pima County, Arizona, on July 20, 1869.

The intention of the grantor to convey all his estate is too plain to merit discussion. Tested by this controlling rule, and the technical arguments of counsel disappear. Aguilar lived until 1876 (Finding II, Rec. 27). During all his life he made no claim to this property adverse to Gandara's right and title. Gandara's petition for confirmation, filed in 1864, averred that Aguilar made the original purchase in 1844 as his agent, with his money and for his benefit; that he Gandara) took immediate possession, received from Aguilar the original title papers, and took the subsequent transfer of 1856 merely to perfect the record. The judge who certifies to the copy of the expediente on which the 1856 transfer was made so certifies that he made such copy from "*its originals*, which are in "the possession of Don Manuel Maria Gandara, at whose "request this copy has been made," &c. From 1844 to his death in 1876, we find Aguilar asserting no claim of title, maintaining no possession, and asking no confirmation of the grant. In short, the entire record demonstrates the rightful ownership and claim of Gandara from 1844 onward.

In his petition for confirmation Gandara asserts that Aguilar was a member of his family, and made the purchase as his agent. Counsel object to the 1856 instrument because expressing no consideration. Aguilar bid in the property in 1844, at the public sale, for $500 (Rec. 24). The deed of 1869, in admitting payment of the consideration of $499, discloses on its face that no money was then paid Aguilar, and his renouncement of the provision of law with respect thereto. This plainly shows that the 1869

instrument was asked and freely executed by Aguilar simply as a more formal conveyance—a deed of further assurance, and is in highest degree corroborative (1) of Gandara's original ownership and (2) Aguilar's constant recognition thereof.

While it may be true that under the Code of Arizona there is "but one form of action," yet it is plain the case at bar is one partaking solely of equitable character and jurisdiction. The prayer of the complaint is, that the remedy sought be enforced by appropriate "decree" of injunction, &c., and for "such other and further relief as "shall be meet and agreeable to equity" (Rec. 2).

Taking the proven facts here (1) that all but two of these plaintiffs are Mexicans, having full knowledge of their ancestors' (Aguilar's) conveyances, and the remaining plaintiffs admit actual notice and knowledge of the same, the record thereof in 1869 in Pima County—long prior to their deeds, the subsequent chain of conveyances to defendants—their possession, improvements, and claim, and by what recognized rule of equity can it be contended that they are entitled to recover against these defendants?

In *Russell* v. *Coffin* (8 Pick. 151) it was held:

"That where it is apparent that there was an intention "in the grantor to convey and in the grantee to take, al- "though the instrument is not calculated technically to "execute that intent, it should be made to operate in some "other way to effect that purpose."

In *American Emigrant Co.* v. *Clark et al.* (62 Iowa, p. 187) it was held:

"It is not essential that a deed of conveyance should "follow any exact or prescribed form of words. If the "intention to convey is unmistakably expressed, that in-

"tention will not be defeated by the fact that the instrument "also partakes of the nature of a contract."

In *Watson et al.* v. *Sherman* (84 Ill. 267) it was held:

"We are aware of no authority, and none has been "cited, which would deprive the defendants of the right "to set up and use their equitable title as a defence to the "title of complainants under which they seek to obtain "the property. Perhaps the rule might be different if the "controversy in regard to the land was in a court of law, "where the defendants would be required to rely solely "upon a legal title, but in a court of chancery, where the "equities of the parties are to be regarded, we entertain "no doubt that the defendants have established an equi-"table title to the premises, which is sufficient to defeat "the equities relied upon by the complainants."

In *Railroad* v. *Hoye* (2 Bland's Chancery Reports, Maryland, p. 261) it was held:

"It would be like allowing a subsequent purchaser, "with full notice, to avail himself of a defect in a convey-"ance, or of the statute of frauds, in opposition to a fair, "equitable, and known right, which would be contrary to "all the principles of equity in this respect, and has never "been permitted in any case whatever."

In *Barr* v. *Hatch* (3 Ohio, 529) it was held:

"It is also a well-settled rule, that when an instrument "intended as a deed to convey lands has not been so ex-"ecuted as to pass the estate, or vest a legal title, equity "has considered it a contract for a deed, and decreed, if "the consideration has been paid, the title to be per-"fected."

In *Flagg* v. *Mann* (2 *Sumner*, 487) it is held that courts of equity do not regard the forms of instruments, but look

to the intent, and give to the acts of the parties that construction which is consistent with the intent and with equity, and a court of equity will not yield to technical rules of law by which the intention of the parties may be defeated.

In *Wadsworth* v. *Wendell* (5 John C., 224) it was held:

"When, therefore, Preston purchased of Thomas, and "when Matthews purchased of him, they were each of "them chargeable with notice of the conveyance of "Thomas to the plaintiff, and of its contents" (although lacking a seal). "They therefore took, subject to that "equity, equally with Thomas himself as with his heirs; "and in the words of Ch. B. Eyre, in *Morse* v. *Faulkner* "(1 Anst., 14): 'It is clear that when there is an agreement "'to convey, or a defective conveyance by a person then "'actually having title, that would be such an equity as "'would bind the lands in the hands of the heirs.' So a "defective conveyance has been even held good against "a subsequent voluntary grantor."

The case of *U. S.* v. *Crosby* (7 Cranch, 114), cited against us, has no proper application hereto. That arose upon a writ of intrusion, a common-law action, where the rigid rule of law was necessarily applied. It cannot control here, where a court exercising equity jurisdiction is asked to do what the foregoing authorities and the established rule of equity forbids.

Tested by these salutary principles, we are entirely willing to submit these conveyances of 1856 and 1869 to the judgment of the Court upon their own recitals, confident that both intention and expression therein unite to make a complete transfer of all the grantor's interest. That within the treaty, *supra*, and even the technical rules of construction sought to be applied, they will be found to be fully operative to convey the title, and equally to silence

this stale attempt made, under circumstances certainly not open to commendation, to destroy the title and right of these defendants acquired in utmost good faith.

But were the instruments in anywise ineffective to fully transfer the fee, it is certain that a court of equity should compel execution of proper deeds by the heirs of Aguilar to effectuate the act and obligation of their ancestor.

In any view, the conveyances of 1856 and 1869 bind these heirs and their privies taking with full notice of the title and possession of the defendants. Their actual admitted knowledge cannot be ignored by the plea that the 1869 conveyance, through assumed technical defects, was not properly admitted to record. They admit actual knowledge thereof, *dehors* the record, and equity will not admit such plea under such circumstances. The plain result is, that if these instruments of 1856 and 1869 are not in themselves perfect and sufficient to vest the title, a court of equity must treat them as "a contract for a deed" and decree "the title to be perfected."

Barr v. *Hatch*, *supra*.

IV.

The Statute of Limitations Applies.

The XXII Finding (Rec. 46) recites:

"That the defendants entered into possession of a part "of the premises in controversy at the date of their deed "aforesaid, to wit, September 21, 1881, and in the latter "part of December, 1882, or early in January, 1883, they "placed a large number of cattle upon said lands, and "have ever since used the same for pasturage of said cat-"tle, and that the said property has been assessed to "them in each year since 1882, including that year, and "the taxes paid by them."

The statutory period of limitation in Arizona is five years, according to the text thereof set out at p. 21 of plaintiff's brief. This suit was commenced June 25, 1887 (Rec. 2), and after this period had fully run. The statute is expressly plead in bar of the action (Rec. 2, 5).

It is contended that defendant's possession in part only, from the date of the deed, does not set the statute in motion. *Per contra*, possession in part under color of title " is construed to be co-extensive with the premises as de-" scribed by the deed or will."

Buswell—Limitations and Adverse Possession, Secs. 252, 254, citing many authorities.

In *Prescott* v. *Nevers*, 3 Mason (C.C.), 330, Story, J., held that—

" Where a person enters into land under a claim of title " thereto by a recorded deed, his entry and possession are " referred to such title, and that he is deemed to have a " seisin of the land co-extensive with the boundaries stated " in his deed, where there is no open adverse possession " of any part of the land so described in any other per-" son."

Again, it is urged, that as the limitation act of Arizona expressly excludes the bar " within five years after the " final confirmation by the United States of any title de-" rived from Spain or Mexico," the act does not here apply.

Whilst counsel contends (Brief, pp. 15, 22, 23, 24) that the grant here involved is complete and perfect, requiring no confirmation, yet in defending against the plea of the statute this contradictory position is assumed. It will be readily seen, however, that in this case the statutory exception has no application.

Under the statute, similar to that found in California,

the effect is to deny its application in suits where the parties claim under hostile sources of title. All the cases decided thereunder plainly show this, and the principle is beyond question. But where, as here, all parties claim under a common source of title, and admit the original grant vested the fee in Aguilar, there is involved solely the question of possession under the same original title, and the statutory limitation has plain application. The intent of the statutory exception is to withhold interference by State legislation while the primary title is unsettled. Without such express exception the same result would follow. But when the primary title is admitted, beginning from a common source, the adverse possession of one party thereunder under distinct and record chain of conveyances clearly runs against others claiming from and admitting the same original source, but setting up an independent derivative title therefrom. The reason for the statutory *exception* could have no possible application in such a case, and the principle and bar of the statute does apply, because as to all the parties the original title is admitted and relied upon.

We submit the judgment below should be affirmed.

A. T. BRITTON,
A. B. BROWNE.
Attys for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

DOLORES G. ASTIAZARAN ET AL.,
Appellants,
vs.
THE SANTA RITA LAND & MINING CO. ET AL.,
Respondents.

No. 1159.

43

MOTION TO ADVANCE.

ROCHESTER FORD,
Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

DOLORES G. ASTIAZARAN ET AL.,
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vs.
THE SANTA RITA LAND & MINING CO. ET AL.,
Respondents.
No. 1159.

MOTION TO ADVANCE.

Now come the appellants herein by their attorney and move the court to advance the above case on the docket of this court, and present the following as a brief

STATEMENT OF THE MATTER INVOLVED.

This is a suit brought in the District Court of the First Judicial District of Arizona by appellants to quiet title to certain lands in Pima County, Arizona, called the ranchos "Tumacacori, Calabasas and Huevavi."

It was alleged in the complaint and admitted by the answers and appears in the findings of fact, that the Mexican government in April, 1884, granted and sold all the lands described in the complaint in this action to one Francisco Alejandro Aguilar in fee by certain original title-papers which defendants admit vested a good and legal title in fee to said Aguilar.

The defendants claim title by mesne conveyances from one Sykes and one Curry, who claim by mesne conveyances from Aguilar, the original grantee.

Plaintiffs are the heirs at law of Aguilar, and their claim of title is based on the theory that their ancestor, Aguilar, the original grantee from the Mexican government, had never conveyed more than a life-estate in the grant, and that the reversion is in the plaintiffs in fee, the life-estate having expired.

Under the act of Congress of July 15, 1870, making it "the duty of the Surveyor-General of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the nature, character and extent of the claims to land in said Territory," Sykes and Curry, on December 22, 1879, filed with the Surveyor-General a petition alleging the sale of the land by the Mexican government to Aguilar, and their ownership under various mesne conveyances from him. Duly-authenticated copies of the original expediente and of the mesne conveyances accompanied this petition.

The Surveyor-General gave an opinion and recommendation on the claim, in which he reported that the "*bona fide* character of the claim is estab-

lished beyond a doubt" by the original title-papers, and that "the genuine character of the title-papers is further established or supported, and the location of the tracts granted fixed, by the official records of the coterminous grants as well as by the contemporaneous history and tradition."

The Surveyor-General reported, further, "that the deraignment of the title from the purchaser, Francisco A. Aguilar, who, in 1844, denounced the land, down to the present claimants, appears to be perfect," and recommended a confirmation to the claimants, Sykes and Curry, of the lands granted in the original title-papers. The report is now pending before Congress, never having been acted on by that body.

When this report of the Surveyor-General was offered in evidence by defendants, so much of it as recommended that the grant be confirmed to Sykes and Curry was excepted to by plaintiffs at the time as incompetent, irrelevant and immaterial, on the grounds that as the Surveyor-General's report had not been acted on by Congress it was no evidence of title in Sykes and Curry, because the Surveyor-General was without jurisdiction to make any report or decision which could in any way affect the plaintiffs' rights to the lands in controversy, and because neither Aguilar nor any of plaintiffs had submitted their claim or title to the Surveyor-General for his decision or report thereon, and that the title and rights of these plaintiffs were never investigated or passed upon by said Surveyor-General.

The Supreme Court of Arizona held that under the act of July 15, 1870, the Surveyor-General was

a judicial or semi-judicial officer, and that his findings are conclusive on the courts until changed by Congress. The court held, therefore, that as the Surveyor-General had recommended confirmation of the grant to Sykes and Curry, this action on his part deprived the court of any jurisdiction. The court, therefore, dismissed the bill, holding "that a Mexican grant is not legal title to sustain an action of ejectment or bill to quiet title; such grant must be confirmed by Congress first," and that "Congress having provided a special tribunal for the adjudication of these claims, the court has no jurisdiction to determine titles to the lands." The opinion of the court appears on pages 56-60 of the printed record.

POINTS IN SUPPORT OF MOTION.

If counsel thought that the questions calling for a decision in this case affected only the parties to the suit, this motion asking that the case be advanced would not be made. But we submit that the decision affects much the larger part of Pima and Cochise counties, Arizona. That portion of Arizona south of the Gila river was, before the Gadsden Purchase of December 30, 1853, in the Mexican "State of the West" (Sonora and Sinaloa). So-called grants, which were really sales, of land in this territory had been freely made by this Mexican State and by the Government of Spain prior to the Mexican Revolution of 1822. At the time of the treaty of Guadalupe Hidalgo and of the Gadsden Purchase, much of California, New Mexico and Ari-

zona was claimed under grants from the former government. The private land-claims in California have been adjusted by the legislation provided by Congress for that State—legislation which secured a final settlement as between grant claimants and the United States.

The acts passed applicable to New Mexico and Arizona (acts of July 22, 1854, and of July 15, 1870), it may be assumed, gave no means of securing final determination of these questions, as between claimants and the United States, outside of direct action by Congress upon the claims, because the acts provided merely for an investigation and report by the Surveyor-General, "which report shall be laid before Congress for such action thereon as may be deemed just and proper."

Under this act the claimants under the grants have presented petitions to the Surveyor-General asking for a confirmation of their claims. The Surveyor-General has reported to Congress that, with very few exceptions, the claims are valid, and has recommended their confirmation. Congress has confirmed a few, but only a few, of the claims, and almost all of them are pending before Congress on the reports of Surveyors-General, Congress having taken no action, though almost one-half of a century has passed since the treaty was made by which the territory was acquired.

The Arizona court now holds that because these claims have not been confirmed by Congress, neither ejectment nor bill to quiet title nor any action involving the title to any of these claims can be entertained, because the court is without jurisdiction.

The court goes to the full length of holding that these lands are beyond the jurisdiction of the courts, and that the courts have no jurisdiction to settle questions of private rights concerning them, so that ejectment will not lie, nor bill to quiet title. Under this decision the widow of the owner of one of these grants could not have dower set out to her, nor could the heirs have a partition of the lands.

The court based its decision on the construction of the act of Congress imposing upon the Surveyor-General certain duties, and held that under this statute his recommendation was binding on the courts as evidence of title. This court, in the case of Pinkerton v. Ledoux, 129 U. S., 346, held, on the contrary, in construing the same statute, "that the Surveyor-General's report is no evidence of title or right to possession."

In the case now under consideration, the Arizona court seems to have confused the questions which may arise between a land-grant claimant and the United States, on the one hand, and questions between private individuals only—for instance, between the heirs of a deceased owner of one of these claims—on the other. We most earnestly submit that though it may be assumed that question between private claimants and the United States must be settled in the way that Congress provides, and that the courts have no jurisdiction to decide those questions unless jurisdiction has been given them by Congress, because the settlement of such questions is for the political branch of the Government—while this may be conceded, it seems just as clear that whether A owns the grant or B does, is a question

with which the United States is not concerned; that such a question is not political but judicial, and is one which the courts and the courts only can decide, whether the grant be unconfirmed or confirmed.

The question of the rights of the United States to the lands covered by this claim is a political one under the treaty, to be adjusted in the manner deemed best by Congress. It may be assumed that the courts have no jurisdiction to determine the rights of the United States. But the rights of the United States are not involved or adjudicated or in any way affected in the case at bar. The question in this case is between rival claimants to the grant, both claiming adversely to the United States, whose rights depend on the construction and effect of certain deeds of conveyance *inter sese*. Is not this question, therefore, one entirely judicial, which the courts can properly adjudicate now, although the grant has not been confirmed? Although the court may decide as between plaintiffs and defendants that one or the other has the better title, the rights of the United States are left precisely as they were before; and when the political question of the rights of the United States comes to be determined, it may be shown that as against the United States neither plaintiffs nor defendants have any title. The claim may be ultimately shown to be invalid, and the title of the United States to the lands thus be vindicated by the defeat of the claim.

The decision of the Arizona court in this case, holding that almost all of the agricultural portions of Pima and Cochise counties, Arizona Territory,

are without the jurisdiction of any court, seems to counsel to be of enough general interest to warrant the advancement of this case. The Arizona court holds that it has no jurisdiction over these private land-claims—no jurisdiction of any sort—because the lands in their present condition cannot be regarded as private property. If this ruling prevails, it seems to throw in confusion the whole subject of the taxation of the lands. The question fairly arises from such a decision, How can any of these lands be assessed to private owners and taxed, if they cannot be regarded as private property?

Counsel hope that this case may be deemed worthy of advancement.

Respectfully submitted.

ROCHESTER FORD,

Of Counsel for Appellants.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

DOLORES G. ASTIAZARAN, JESUS A. DEOCEGUERA, FRANCISCO OCEGUERA, ET AL., APPELLANTS,

v.

THE SANTA RITA LAND & MINING COMPANY AND THE NEW MEXICO & ARIZONA RAILROAD COMPANY.

No. 43.

AUTHORITIES.

I.

ACKNOWLEDGMENT.

"But a deed may convey a title as against the grantor "and his heirs though not acknowledged so as to be ad- "mitted of record."

3d Washburn on Real Property, p. 288.

In general, land passes by a deed not acknowledged or recorded.

Marshall v. *Fisk*, 6 *Mass.* 24.

A deed for the purpose of suffering a common recovery is good, though not acknowledged.

Lee v. *Hall*, 2 *Har. & M'Hen.* 19.

A deed was admitted in evidence, in an action of trespass, although it appeared by the acknowledgment that the grantor did not acknowledge it to be his free act and deed.

Bair v. *Valliant*, 4 *Har. & M'Hen.* 62

The object of the acknowledgment of a deed is to procure its enrollment; and, as between the parties to the deed, the acknowledgment adds nothing to its validity. Against the grantor, and his heirs, and also against a stranger, the instrument may be introduced in evidence without acknowledgment.

Brown v. *Munter*, 2 *Foster* (*N. H.*), 468.

Proof of acknowledgment of a deed of trust is necessary only for the purpose of registration and does not affect the validity of the deed between the parties.

Hill v. *Samuel*, 21 *Miss.* (2 *George*) 307.

As between the parties to a mortgage the certificate of acknowledgment is unnecessary to its validity, provided its execution and delivery be proved.

Watson v. *Campbell*, 28 *Barber* (*N. Y.*), 421.

Although a deed is defectively acknowledged, or even not acknowledged at all, it is good as between the parties and subsequent purchasers with actual notice.

1870, *Steven* v. *Hampton*, 46 *Mo.* 404.

Bishop v. *Schneider*, *id.* 474.

Ryan v. *Carr*, *id.* 483.

A deed that is unacknowledged passes title equally with one duly acknowledged and certified. Acknowledgment has reference to the proof of execution simply, and not to the force of the instrument.

1871, *Gray* v. *Ulrich*, 8 *Kansas*, 112.

Revised Statutes of Texas, Article 600, making acknowledgment or proof of execution of a deed by a corporation necessary before record, does not make such deed invalid and inadmissible in evidence, though not acknowledged or proved as therein required.

Kimmarle v. *Houston & T. C. R'y Co.* (*Tex.*), 12 *S. W.* 698.

II.

Proceeding Controlled by Remedy Sought.

"The Sureme Court and the District Courts respectively "of every Territory, shall possess chancery as well as "common law jurisdiction."

Act April 7, 1874, U. S. R. S., Sec. 1868.

In *Basey* v. *Gallagher* (20 Wall. 670, 679) the Court said:

"By the organic act of the Territory, the District Courts "are invested with chancery and common law jurisdic- "tion. The two jurisdictions are exercised by the same "Court, and under the legislation of the Territory the "modes of procedure up to the trial or hearing are the "same whether a legal or equitable remedy is sought. "The suitor, whatever relief he may ask, is required to "state 'in ordinary and concise language' the facts of his "case upon which he invokes the judgment of the "Court. But the consideration which the Court will give "to the questions raised by the pleadings, when the case "is called for trial or hearing, whether it will submit

"them to a jury, or pass upon them without such inter-
"vention, must depend upon the jurisdiction which is to
"be exercised. If the remedy sought be a legal one, a
"jury is essential, unless waived by the stipulation of the
"parties; but if the remedy sought be equitable, the
"Court is not bound to call a jury, and if it does call
"one, it is only for the purpose of enlightening its con-
"science, and not to control its judgment. * * *

"The formal distinctions in the pleadings and modes of
"procedure are abolished, but the essential distinction
"between law and equity is not changed."

III.

Effect in Equity of Unsealed Instrument.

"If, for an example, an instrument, from its improper
"execution *in wanting a seal*, is inoperative at law as a
"conveyance or as a mortgage of land, equity may treat
"it as an agreement to convey or to give a mortgage and
"as therefore creating an equitable interest in or lien upon
"the land."

Pomeroy's Equity, Vol. 1, Sec. 383.

IV.

Equity Applies Statute of Limitations.

"That the statute of limitations is applied by courts of
"equity in all cases where at law it might be pleaded, is a
"well-settled principle. At law, to make the statute a
"bar, there must be an adverse possession; and by anal-
"ogy a court of equity, in a similar case, will hold the
"statute to be a good bar."

Coulson v. *Walton*, 9 Pet. 82.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellees.

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vs.

THE SANTA RITA LAND AND MINING COMPANY AND THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF OF APPELLANTS IN REPLY.

ROCHESTER FORD,
Counsel for Appellants.

Supreme Court of the United States.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF OF APPELLANTS IN REPLY.

I.

JURISDICTION.

Counsel for appellees admit on page 19 of their brief that under the authority of Ely *vs.* New Mexico, etc., R. R. Co., 129 U. S. 291, the complaint herein states facts sufficient to constitute a cause of action under the Arizona statute under

which this action was brought. So far, therefore, as the opinion of the supreme court of Arizona was based on the belief that this complaint does not state a cause of action, it is erroneous. Counsel urge, however, that the court had no jurisdiction over this case, and in support of this view cite the cases of Tameling *vs.* U. S. Freehold, etc., Co., 93 U. S. 644; Maxwell Land Grant Case, 121 U. S. 325, 365; Botiller *vs.* Dominguez, 130 U. S. at page 250, and contend, also, that the act of March 3, 1891, creating the Court of Private Land Claims, sets at rest all questions of jurisdiction here presented.

While the question of jurisdiction was not raised in the Ely *vs.* New Mexico, etc., Railroad Co. case, the complaint therein stated, as does this complaint, that the plaintiff was the owner in fee of a piece or parcel of land granted by the Mexican authorities. As the subject matter of the litigation was thus brought before this Court's attention, we believe that if there had been any question as to the jurisdiction of the court, it would have been raised by the court itself; but in the Ely case this Court held that the complaint was sufficient to authorize the court to determine the claim of the defendants and the title of the plaintiff.

We respectfully submit that the cases cited by counsel for appellees will be found to have no bearing upon the question now before the Court. In the Tameling case the Sangre de Cristo grant had been approved and recommended for confirmation by Congress, and Congress had acted upon the claim "as recommended for confirmation by the surveyor-"general." Under these circumstances this Court held that it was concluded by the action of Congress, and in its opinion stated substantially that the obligations which the treaty

of cession imposed upon the political department of the Government might be fulfilled in any manner which Congress thought best to provide by legislation. The question presented in this case was wholly different from the one now before the Court, and there is no suggestion that the act under which the surveyor-general laid his opinion before Congress was intended to adjust or settle titles between private citizens making claim to the same lands.

In the Maxwell land-grant case, *supra*, a bill had been filed by the United States asking for a decree setting aside and declaring void a patent from the United States confirming the grant to Beaubien and Miranda. This Court held that it was not for the judicial power of the Government to controvert the action which Congress had taken acting in its sovereign capacity upon the question of the validity of the grant. While the courts have no jurisdiction for this purpose, there is no suggestion that they have no jurisdiction over suits between private persons making claim to the same lands.

After these decisions this Court in Pinkerton *vs.* Ledoux, *supra*, construed the effect of a report made by a surveyor-general under the act of July 22, 1854, holding that such report was no evidence of title or right to possession, and that his duties consisted merely in making inquiries and reporting to Congress for its action.

The Botiller *vs.* Dominguez case, *supra*, announces no such doctrine as appellees contend for. The act "to ascertain and "settle the private land claims in the State of California" (act of March 3, 1851) prescribed "that each and every per- "son claiming lands in California by virtue of any right or "title derived from the Spanish or Mexican government

"shall present the same," etc. This Court held that this act required the presentation of perfect grants as well as those which were imperfect. Where, therefore, no claim had been filed within the time prescribed by this act, such lands were, under the provisions of said act, "deemed, held and con-"sidered as part of the public domain of the United States." There was no question in this case as to the rights of private citizens making claim to the same grant which had not been finally adjudicated. In delivering the opinion of this Court Justice Miller said: "Every person owning land or other "property is at all times liable to be called into a court of "justice to contest his title to it. This may be done by "another individual or by the government under which he "lives. It is a necessary part of a free government, in which "all are equally subject to the laws, that whoever asserts "rights or exercises powers over property may be called be-"fore the proper tribunals to sustain them."

Why, under this principle, are appellees not "liable to be called into a court of justice to contest their title" to this property which they claim to own? When they "assert rights and exercise powers" over the lands which are the subject of this litigation, why may they not "be called before the proper tribunals to sustain them?"

In spite of the contention of appellees that the act of March 3, 1891, creating the Court of Private Land Claims provides for the hearing and determination of questions of title *inter partes* as well as between the United States and the claimant, we respectfully and earnestly submit that the act is incapable of such a construction. The 15th section of the act to ascertain and settle the private land claims in the State of California provides that "the final decrees rendered by the

"said commissioners, or by the District or Supreme Court of "the United States, or any patent to be issued under this act, "shall be conclusive between the United States and the said "claimants only, and shall not affect the interests of third "persons." This act, this Court say in Botiller *vs.* Dominguez, "obviously was not intended to adjust or settle titles between "private citizens making claim to the same lands." The fifth paragraph of section thirteen of the act of March 3, 1891, contains a provision similar to the one just quoted from the California act, viz: "No proceeding, decree or act under this "act shall conclude or affect the private rights of persons as "between each other, all of which rights shall be reserved "and saved to the same effect as if this act had not been "passed." Is it not obvious, in fact, absolutely undeniable, that this act of March 3, 1891, "was not intended to adjust "or settle titles between private persons making claim to the "same lands?"

Moreover, the act of March 3, 1891, in marked contrast with the act to ascertain and settle the private land claims in the State of California, does not provide, as did that act, that each and every claim must be presented to it under penalty of forfeiture. Botiller *vs.* Dominguez held, as just stated, that Congress could require this and that it did so require in the California act, and that a grant, even though perfect, not presented within the time prescribed by that act, became forfeited; but the act of March 3, 1891, provides in section eight that persons claiming lands under a title "that "was complete and perfect at the date when the United States "acquired sovereignty therein, shall have the right (but "shall not be bound) to apply to the said court," etc.; and there is nothing in the record to show that the grant herein

has been presented to the Court of Private Land Claims, or that it ever will be.

Under the decision in Pinkerton *vs.* Ledoux, *supra*, that the report of the surveyor-general is "no evidence of title "or right of possession," appellants could not be affected by any report he might make.

Claiming to own a complete and perfect title, they are not compelled to present it to the Court of Private Land Claims under the act of March 3, 1891, and any proceedings by other persons under that act, if any should ever be taken, would in no way affect them.

We confidently maintain, therefore, that appellants, claiming to own these lands under what was alleged and shown by the record to be a complete and perfect title, have the right to go into any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. Under the third article of the Louisiana treaty, which article is the fifth of the Gadsden purchase, this Court has uniformly held from U. S. *vs.* Pillerin, 13 How., 9, and earlier cases, that complete and perfect titles were protected by the treaty and were independent of legislation by Congress, except as the owners of such titles, like other owners, might be called before the proper tribunals to sustain their claims. The owners of such titles, as this Court say in the opinion delivered by Chief Justice Taney in Fremont *vs.* U. S., 17 How., 542, 553, "may assert their titles "in the ordinary forms of law upon the documents under "which they claim."

We certainly believe that this Court will follow these decisions and hold that the lower court had jurisdiction. Where except in the courts of ordinary jurisdiction can the

actions of ejectment or to quiet title to grants like the one under consideration be maintained? Certainly not before the Court of Private Land Claims.

Even where, as in many cases in California, grants were imperfect in their character and were, therefore, under the control of the Government of the United States, and any regulations which that Government might prescribe for the purpose of protecting and perfecting them, the State courts had jurisdiction to sustain actions of ejectment in favor of grant claimants pending confirmation and segregation of their grants. Such is the language of Mr. Justice Field in delivering the opinion of the Court in Montgomery *v.* Bevans, 1 Sawyer, 653, at pages 682–684. If the grantee under an imperfect grant could thus in strict justice maintain his action of ejectment or to quiet title, it would manifestly seem to be true that the plaintiffs herein, claiming under a perfect title needing no confirmation, can do so.

Counsel for appellees state that the contention that the grant in question is a complete and perfect one and needs no confirmation is "mere assumption." We do not believe that this Court will so hold.

Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition. They are not, as to such countries, foreign laws, but laws of an antecedent government. (U. S. *vs.* Perot, 98 U. S., 428; Fremont *vs.* U. S., 17 How., 542.)

Whether or not the grant under which appellants and appellees claim was a perfect or complete title is a question for this Court, and the objection of counsel for appellees that the foreign laws under which it was made are not set out in

the record nor proven as a fact herein is entitled to no consideration in view of the holding of this Court in U. S. *vs.* Turner, 11 How. 663, and the cases before cited, that the Spanish laws under which grants or sales of land were made must be judicially noticed and expounded by the court; that they are questions of law and not questions of fact, and that they can never be treated as the laws of a foreign nation to be ascertained and determined as a matter of fact upon the testimony of witnesses. Whether the grant under consideration is a perfect and complete title is a question for the court, and in determining this question the court will take judicial notice of the fact that after the independence of Mexico in 1821, sales made by the State of the West (of which what is now Arizona Territory was a part) were not voluntary grants for services, or colonization grants, but were executed contracts of purchase, where the land, after certain preliminary proceedings, was put up at auction and sold to the highest bidder. Such so-called grants are confined to the land acquired under the Gadsden treaty. They were sales by metes and bounds in fee.

The grant passed on by this Court in U. S. *vs.* Watkins, 97 U. S. 219, was said by this Court to be "a complete and per-"fect title, * * * described by metes and bounds accord-"ing to a survey thereof which had been previously regu-"larly made. * * * The grant was made in pursuance "of a sale of the land."

So we submit that the grant in litigation is a complete and perfect title in fee. The record presents every link in the chain of a perfect expediente. (Carpentier *vs.* Montgomery, 13 Wall., 180, at pp. 493–494; U. S. *vs.* Knight's adm'r, 1 Black, 227; Phelan *vs.* Poyorena, 13 Pac. Rep.,

681.) The language of the *pro tanto* or granting part of the *testimonio* is that I (the departmental treasurer) "concede, "sell, give, and adjudicate in due form the said lands," and (Record p. 26) the grantee or his successors shall not be permitted "to be disturbed or molested in the free use, exer- "cise, ownership, dominion, and possession of the said land." Williams *et al. vs.* U. S., 92 U. S. 457, at page 460 is submitted as directly stating that such language conveyed the fee.

As between the parties to this action (the United States not being a party and being in nowise affected by this litigation) the question is fairly before this Court whether the grant under which all parties claim is not a complete and perfect title. We believe the Court will declare it such, but whether it does or not, we submit that the courts clearly have jurisdiction to hear and determine as against each other the rights of rival claimants to these lands. Even if it were true that as against the United States some action were required on the part of the Government to confirm or protect the rights of the grantees, there is nothing in reason or authority to forbid rival claimants, prior to such confirmation, from adjusting in the courts of ordinary jurisdiction their rights against each other. The United States have no interest in such a controversy. Whether plaintiffs or defendants own these lands is a matter of no concern to the Government.

II.

THE MERITS.

We respectfully submit that the cases cited by counsel for appellees do not sustain their position that the instruments